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Supreme Court, U.S.
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No. 90 -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA POWER COMPANY,

Petitioner,

v.

GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

1. Whether, based upon historical practice prior to, contemporaneous with and subsequent to the ratification of the Due Process Clause of the Fourteenth Amendment, an award of punitive damages for negligent, unintentional, non-malicious conduct constitutes a *per se* violation of that Clause; and

2. If such an award is not *per se* violative of the Due Process Clause of the Fourteenth Amendment, whether that Clause requires that defendants exposed to such awards be given process beyond that specified by this Court in *Pacific Mutual Life Insurance Co.* v. *Haslip*, including but not limited to a requirement that such defendants may not suffer punitive damage awards in the absence of an express statutory or common law limit establishing in advance the maximum punishment that may be imposed.

STATEMENT OF INTERESTED PARTIES

All parties to this case are named in the caption. Pursuant to Rule 29.1 of the Rules of this Court, the following constitutes a list of all parent companies and non-wholly owned subsidiaries of petitioner: Alabama Power Company is the wholly owned subsidiary of The Southern Company. Alabama Power Company presently owns 50% of Southern Electric Generating Company.

TABLE OF CONTENTS

	Page
OPINIONS AND ORDERS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	2
B. Presentation and Decision of the Federal Questions	5
REASONS FOR GRANTING THE WRIT	6
A. The Court Should Grant the Writ to Decide Whether Punitive Damage Awards Based on Negligent, Unintentional, Non-Malicious Conduct Constitute a *Per Se* Violation of the Due Process Clause	8
1. Punitive damage awards for negligent, unintentional, non-malicious conduct conflict with centuries of Anglo-American jurisprudence	9
2. Punitive damage awards for negligent, unintentional, non-malicious conduct violate the fundamental notions of fairness embodied in the due process clause	19
B. The Court Should Grant the Writ to Decide Whether Punitive Damage Awards for Negligent, Unintentional, Non-Malicious Conduct Must Be Subject to More Exacting Due Process Requirements than Those that Apply to Intentional Conduct	24
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
Alabama Great Southern R. Co. v. *Arnold*, 84 Ala. 159, 4 So. 359 (1887)	15
Alabama Power Co. v. *Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988)	26
Bannon v. *Baltimore & Ohio R. Co.*, 24 Md. 108 (1866)	18
Behrens v. *Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah 1983)	16
Black Belt Wood Co. v. *Sessions*, 514 So. 2d 1249 (Ala. 1987)	2,21,28
Bonsignore v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982)	7
Brown v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985)	7
Bud Wolf Chevrolet, Inc. v. *Robertson*, 508 N.E.2d 567 (Ind. Ct. App. 1987), *vacated in part*, 519 N.E.2d 135 (Ind. 1988)	7
Burlington Northern R. Co. v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250)	4,26
Citizens' Street Railway v. *Steen*, 42 Ark. 321 (1883)	15
City Bank of Alabama v. *Eskridge*, 521 So. 2d 931 (Ala. 1988)	26
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	14
Coryell v. *Colbaugh*, 1 N.J.L. 77 (1791)	9,12
Day v. *Woodworth*, 54 U.S. (13 How.) 362 (1852)	9,12
Deaton, Inc. v. *Burroughs*, 456 So. 2d 771 (Ala. 1984)	26
Dees v. *Gilley*, 339 So. 2d 1000 (Ala. 1976)	26
Dennis v. *United States*, 341 U.S. 494 (1951)	19
Doe v. *Filliter*, 153 Eng. Rep. 20 (Ex. 1844)	15

Table of Authorities Continued

	Page
Dyna-Med, Inc. v. *Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987)	21
Eichenseer v. *Reserve Life Insurance Co.*, 894 F.2d 1414 (5th Cir. 1990), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303)	6,7
Emblen v. *Myers*, 158 Eng. Rep. 23 (1860)	15
Enmund v. *Florida*, 458 U.S. 782 (1982)	25
Estes Health Care Centers, Inc. v. *Bannerman*, 411 So. 2d 109 (Ala. 1982)	26
First Interstate Development Corp. v. *Ablanedo*, 511 So. 2d 536 (Fla. 1987)	7
Forest City Machine Works, Inc. v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720 (1981)	22
Genay v. *Norris*, 1 S.C.L. (1 Bay) 6 (1784)	9
General Telephone Co. of Alabama v. *Cornish*, 291 Ala. 293, 280 So. 2d 541 (1973)	26
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	14
Green Oil Co. v. *Hornsby*, 539 So. 2d 218 (Ala. 1989)	3
Hamilton v. *Third Avenue R. Co.*, 53 N.Y. 25 (1873)	20
Holdridge v. *United States*, 282 F.2d 302 (8th Cir. 1960)	25
Hood v. *Fulkerson*, 102 N.M. 677, 699 P.2d 608 (1985)	16
Horton v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985)	7
Huckle v. *Money*, 95 Eng. Rep. 768 (K.B. 1763)	12
Hurtado v. *California*, 110 U.S. 516 (1884)	9
International Brotherhood of Electrical Workers v. *Foust*, 442 U.S. 42 (1979)	14,17
Johnson v. *Geer Real Estate Co.*, 239 Kan. 324, 720 P.2d 660 (1986)	16,21

Table of Authorities Continued

	Page
Lake Shore & Michigan Southern Railway Co. v. *Prentice*, 147 U.S. 101 (1893)	14
Lane v. *Otts*, 412 So. 2d 254 (Ala. 1982)	26
Lienkauf & Strauss v. *Morris*, 66 Ala. 406 (1880)	15
Linsley v. *Bushnell*, 15 Conn. 225 (1842)	12
Louis Pizitz Dry Goods Co. v. *Yeldell*, 274 U.S. 112 (1927)	28
Lugo v. *LJN Toys, Ltd.*, 146 A.D.2d 168, 539 N.Y.S.2d 922 (1989), *aff'd*, 552 N.Y.S.2d 914 (1990)	22
Magnusson v. *Swan*, 291 Ala. 151, 279 So. 2d 422 (1973)	26
Masaki v. *General Motors Corp.*, 780 P.2d 566 (Haw. 1989)	22
Memphis & Charleston R. Co. v. *Whitfield*, 44 Miss. 466 (1870)	15
Milwaukee & Saint Paul R. Co. v. *Arms*, 91 U.S. 489 (1875)	13
Missouri Pacific Railway Co. v. *Humes*, 115 U.S. 512 (1885)	14
Morissette v. *United States*, 342 U.S. 246 (1952)	20,23
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856)	9
Nast v. *Lockett*, 312 Md. 343, 539 A.2d 1113 (1988)	21
Ocean Cruise Lines, Inc. v. *Abeta Travel Service, Inc.*, 562 So. 2d 205 (Ala. 1990)	26
Pacific Mutual Life Insurance Co. v. *Haslip*, No. 89-1279 (U.S. Mar. 4, 1991)	*passim*
Philadelphia, Wilmington, & Baltimore R. Co. v. *Quigley*, 62 U.S. (21 How.) 202 (1858)	12
Richmond & Danville R. v. *Freeman*, 97 Ala. 289, 11 So. 800 (1892)	15

Table of Authorities Continued

	Page
Rinker v. *Ford Motor Co.*, 567 S.W.2d 655 (Mo. App. 1978)	22
Schwertfeger v. *Moorehouse*, 569 So. 2d 322 (Ala. 1990)	26
Scott v. *Donald*, 165 U.S. 58 (1897)	14
Scott v. *Freuhauf Corp.* 396 S.E.2d 354 (S.C. 1990)	22
Sears v. *Lyons*, 171 Eng. Rep. 658 (1818)	12
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)	9
Sliman v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267 (1986), *cert. denied*, 486 U.S. 1031 (1988)	7
Smith v. *Wade*, 461 U.S. 30 (1983)	*passim*
Solem v. *Helm*, 463 U.S. 277 (1983)	24,27
Southern Life & Health Insurance Co. v. *Smith*, 518 So. 2d 77 (Ala. 1987)	26
Southern Railway Co. v. *Bush*, 122 Ala. 470, 26 So. 168 (1899)	28
Stone v. *Codman*, 32 Mass. (15 Pick.) 297 (1834)	12
Tillotson v. *Cheetham*, 3 Johns. 55 (N.Y. 1808)	12
Travelers Indemnity Co. v. *Armstrong*, 442 N.E.2d 349 (Ind. 1982)	7
Treadwell Ford, Inc. v. *Sarris*, 510 So. 2d 535 (Ala. 1987)	26
Tri-Aspen Construction Co. v. *Johnson*, 714 P.2d 484 (Colo. 1986)	16
Tullidge v. *Wade*, 95 Eng. Rep. 909 (K.B. 1769)	12
Tuttle v. *Raymond*, 494 A.2d 1353 (Me. 1985)	16
Twining v. *New Jersey*, 211 U.S. 78 (1908)	9

Table of Authorities Continued

	Page
Underwood v. *Hall*, 572 So. 2d 490 (Ala. Civ. App. 1990)	26
United States v. *Balint*, 258 U.S. 250 (1922)	23
United States v. *Dotterweich*, 320 U.S. 277 (1943)	23
United States v. *Freed*, 401 U.S. 601 (1971)	23
United States v. *Halper*, 490 U.S. 435 (1989)	23
Volz v. *Coleman Co.*, 155 Ariz. 567, 748 P.2d 1191 (1987)	22
Wallen v. *Allen*, 231 Va. 289, 343 S.E.2d 73 (1986)	16
Wangen v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437 (1980)	22
Western Union Telegraph Co. v. *Eyser*, 91 U.S. 495 (1875)	13,14
Wilkes v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763)	9,12
Wise v. *Daniel*, 221 Mich. 229, 190 N.W. 746 (1922)	20
Wooderson v. *Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984)	21

Federal Constitutional Provisions

U.S. Const. art. III	4
U.S. Const. amend. VIII	24
U.S. Const. amend. XIV	*passim*

Federal Statutes

11 U.S.C. § 362(h) (1988)	22
12 U.S.C. § 3417(a)(3) (1988)	22
15 U.S.C. § 1681n (1988)	22
15 U.S.C. § 1691e(b) (1988)	23
21 U.S.C. § 117(b) (1988)	23
28 U.S.C. § 1257(a) (1988)	2,4

Table of Authorities Continued

	Page
29 U.S.C. § 666(c) (1988)	23
35 U.S.C. § 284 (1988)	23
42 U.S.C. § 300aa-23(d) (1988)	22
42 U.S.C. § 9607(c)(3) (1988)	23
45 U.S.C. § 711(j) (1988)	23
49 U.S.C. § 11901(b) (1988)	23
State Statutes	
Alabama Code §§ 6-5-410, 6-5-411 (1975)	2
Alabama Code §§ 6-11-21, 6-11-29 (Supp. 1990)	2
Alabama Code §§ 13A-5-7, 13A-5-12, 13A-6-4 (1975)	27
Alabama Code § 22-30-19 (Supp. 1990)	27
Arkansas Stat. Ann. §§ 5-4-201, 5-10-105 (1987)	27
Georgia Code Ann. §§ 16-5-3, 17-10-3 (1988)	27
Illinois Ann. Stat. ch. 38, para. 1005-9-1 (Smith-Hurd 1983)	29
Louisiana Rev. Stat. Ann. § 14:32 (West 1986)	27
Missouri Ann. Stat. § 560.011 (Vernon 1979)	29
Treatises	
D. Dobbs, *Law of Remedies* (1973)	17,21
G. Field, *The Law of Damages* (1876)	10,16
W. Hale, *Law of Damages* (2d ed. 1912)	16
H. Hart, *Punishment and Responsibility* (1968)	25
F. Hilliard, *Remedies for Torts* (2d ed. 1873)	16
P. Huber, *Liability: The Legal Revolution and Its Consequences* (1988)	11
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Table of Authorities Continued

	Page
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F. Pollack, *Law of Torts* (1887)	11
T. Sedgwick, *Measure of Damages* (4th ed. 1868)	10,11,13
T. Sedgwick, *Measure of Damages* (9th ed. 1912)	16
T. Shearman & A. Redfield, *Law of Negligence* (3d ed. 1874)	15,16,17
J. Sutherland, *Law of Damages* (1882)	10
2 J. Sutherland, *Law of Damages* (3d ed. 1903)	16
6 S. Thompson, *Law of Negligence* (2d ed. 1905)	17
H. Wood, *Wood's Mayne on Damages* (3d English & 1st American ed. 1880)	17
Miscellaneous	
Black's Law Dictionary (5th. ed. 1979)	21
Restatement (Second) of Torts § 908 (1979)	17

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v.

GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Alabama Power Company ("Alabama Power") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama. That court imposed $3,500,000 in punitive damages against Alabama Power for negligent, unintentional, non-malicious conduct. In doing so, that court rejected petitioner's federal constitutional challenges to this punitive damage award.

OPINIONS AND ORDERS BELOW

The January 11, 1991 opinion of the Supreme Court of Alabama affirming the judgment of the trial court, after remittitur, and rejecting petitioner's federal constitutional objections to the $3,500,000 punitive damage award is unreported and is reproduced in App. A, *infra*, 1a-25a. The trial court's November 15, 1989 order denying petitioner's Motion for Judgment Notwithstanding the Verdict or in the Alternative, for a New Trial is unreported and is reproduced in App. B, *infra*, 26a-31a.

JURISDICTION

Petitioner presented its federal constitutional objections to punitive damages at every stage of the proceedings in the Alabama courts. *See infra* pp. 5-6. The January 11, 1991 decision of the Supreme Court of Alabama expressly rejected petitioner's federal constitutional challenges to the $3,500,000 punitive damage award. This petition is being filed within ninety days of the filing of that decision. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Statement of Facts

Because of a judicial gloss placed upon it, only punitive damages may be imposed under Alabama's wrongful death statute, *Alabama Code* §§ 6-5-410, 6-5-411 (1975). A jury may award punitive damages if it finds that the defendant acted merely negligently; not even gross negligence or recklessness is required.[1] Although the Alabama legislature recently has imposed a $250,000 cap on punitive damage awards for most cases,[2] neither that legislation nor Alabama case law establishes a maximum amount of punitive damages that a jury is permitted to award under the wrongful death statute.[3] Furthermore, the process afforded

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[1] *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1261-62 (Ala. 1987).

[2] *Alabama Code* § 6-11-21 (Supp. 1990).

[3] The legislation that limits most punitive damage awards to $250,000 is expressly inapplicable to the wrongful death statute. *Alabama Code* § 6-11-29 (Supp. 1990).

to non-wrongful death defendants sued pursuant to that "tort reform" statute and charged with intentional conduct is more exacting and rigorous than the process available to wrongful death defendants, who enjoy neither the "cap" nor any of the other procedural guarantees of the "tort reform" statute.[4] In *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991), this Court held that the process afforded by the Alabama courts to defendants charged with intentional misconduct does not violate federal due process. The Court, however, was not presented the question whether that process, if applied to merely *negligent* conduct, would satisfy the requirements of the Due Process Clause. This case presents that question, which is of great importance given the recent tendency of the courts of Alabama, Mississippi and various other States to authorize the award of essentially unlimited punitive damages on the basis of merely negligent, non-intentional conduct—thereby departing dramatically from centuries of contrary practice under the common law.

This case arose from the death of Kenneth A. Turner, a truck driver. Mr. Turner was electrocuted when, as he was attempting to close the rear door of his parked truck, the door came in contact with an energized guy wire that was maintained by Alabama Power. App. A, *infra*, 1a. Respondent, the administrator of Mr. Turner's estate, filed an action under Alabama's wrongful death statute. The jury expressly found that Alabama Power had been negligent and awarded respondent $5,000,000 in punitive damages. *Id.* The jury verdict form, which required the jury

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[4] The procedures afforded to wrongful death defendants involve three steps: (1) the trial court must exclude any evidence concerning the defendant's financial position and instruct the jury that it must limit any punitive damage award to what is necessary to accomplish society's goals of punishment and deterrence; (2) the trial court must, on the basis of seven general factors, determine whether the jury's award was excessive or inadequate and issue an order stating the reasons for its determination; and (3) the Supreme Court of Alabama ostensibly reviews the trial court's determination to ensure that the award is reasonable in light of society's goals of deterrence and punishment. *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989).

to indicate whether Alabama Power had acted wantonly or merely negligently, unequivocally establishes that the basis of the jury's award was simple negligence and not wantonness. App. C, *infra*, 32a. The trial court denied Alabama Power's Motion for Judgment Notwithstanding the Verdict or in the Alternative, for a New Trial. App. B, *infra*, 26a-31a. On January 11, 1991, the Supreme Court of Alabama found that the jury's award was excessive, but otherwise affirmed the trial court's judgment conditioned on respondent's acceptance of a remittitur of $1,500,000, App. A, *infra*, 15a, which was accepted.

The instant case is readily distinguishable from a case in which this Court recently denied certiorari, *Burlington Northern R. Co.* v. *Whitt*, *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250). In *Burlington Northern*, the plaintiff's husband died when the tractor-trailer he was driving collided with a Burlington Northern train at a railroad crossing. Petition for a Writ of Certiorari at 2a-4a, *Burlington Northern R. Co.* v. *Whitt* (No. 90-1250), *cert. denied*, 59 U.S.L.W. 3665, 3672 (Apr. 1, 1991) (No. 90-1250). The plaintiff sued Burlington Northern under Alabama's wrongful death statute, alleging both negligence and wantonness. *Id.*, at 1a, 8a. The jury awarded the plaintiff $15,000,000 in punitive damages. *Id.*, at 2a, 8a. Unlike the case at bar, however, the jury in *Burlington Northern* was not asked to determine whether the defendant had acted wantonly or merely negligently. Because the Supreme Court of Alabama concluded that the record contained, "without a doubt, substantial evidence of wantonness," *id.*, at 18a, this Court had no jurisdiction under Article III or § 1257(a) to consider the similar federal constitutional claim advanced by Burlington Northern because any opinion of this Court would have been purely advisory. Thus, the questions whether punitive damages may be awarded for simple negligent conduct, and if so, what constraints are placed on the award of punitive damages for simple negligence under the Due Process Clause of the Fourteenth Amendment, were not properly before

the Court in *Burlington Northern*. These questions, decided adversely to Alabama Power below, are properly presented to the Court in the instant case.

B. Presentation and Decision of the Federal Questions

Because respondents in this Court invariably claim, sometimes correctly, that various federal constitutional challenges to punitive damage awards have not been properly presented to the lower courts involved, Alabama Power will briefly address that issue. Alabama Power raised its federal constitutional objections to punitive damages at every stage below. In its Answer, Alabama Power asserted as its Third Defense that the "Alabama Wrongful Death Statute . . . is unconstitutional in that it permits punitive damages to be awarded for simple negligence alone," and as its Fourth Defense and in its Sixth Defense that the "Alabama Wrongful Death Statute, . . . as construed and applied, permits only punitive damages, and to permit a punitive damage award under the facts and circumstances of this case, and based on the allegations of the complaint, would deprive this Defendant of its property rights in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States . . . due to the lack of sufficient standards governing such punitive damage awards." App. D, *infra*, 34a-35a. Alabama Power reiterated these arguments in its Motion for Judgment Notwithstanding the Verdict or in the Alternative, for a New Trial. App. E, *infra*, 37a-42a.

In the Supreme Court of Alabama, Alabama Power contended, *inter alia*, that "the Alabama wrongful death statute, as construed and applied in this case, violates the Constitution of the United States. It has been amply demonstrated that [petitioner] has been deprived, by the judgment, verdict and proceedings below, of its property without due process of law . . . in violation of the Fourteenth . . . Amendment[ ] of the Constitution of the United States." App. F, *infra*, 45a. The Supreme Court of Alabama concluded that "Alabama Power's argument based on due process under the Fourteenth Amendment . . . [has] been properly presented and will be addressed." App. A,

infra, 3a. That court understood petitioner's federal constitutional argument to be "that Alabama's wrongful death statute denies [petitioner] its due process rights under the Fourteenth Amendment . . . because the statute allows only punitive damages, and not compensatory damages, upon a finding of negligence by a preponderance of the evidence, and, further, allows a jury to assess the amount of damages at its discretion." *Id.*, at 4a. The Supreme Court of Alabama expressly rejected petitioner's federal constitutional challenges. *Id.*, at 4a-9a.

Based upon the foregoing, there can be no doubt that Alabama Power fully and adequately presented its federal constitutional claims to the Alabama courts.

REASONS FOR GRANTING THE WRIT

For the past two centuries, courts have refused to permit the imposition of punitive damages unless the conduct at issue was deliberate, malicious, or wanton. As discussed below, the courts have varied in their terminology, but until very recently virtually all (other than the courts of Alabama) have insisted that mere negligence would not support a punitive damage award. In contravention of this widespread historical acceptance of common law limits on the imposition of punitive damages, Alabama's wrongful death statute permits punitive damages to be awarded for negligent, unintentional, non-malicious conduct.

Very recently, certain other jurisdictions, while sometimes purporting to apply a stricter standard than mere negligence, have also authorized the award of punitive damages for what appears to have been simple negligence. The "line between negligence and gross negligence . . . is all too murky," *Eichenseer* v. *Reserve Life Insurance Co.*, 894 F.2d 1414, 1420 n.10 (5th Cir. 1990) (Jones, J., dissenting from denial of rehearing *en banc*), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303), and state courts are crossing that line with alarming frequency. For example, the plaintiff in *Eichenseer* was

awarded under Mississippi law $500,000 in punitive damages for the insurance company's failure to obtain all relevant medical information regarding the plaintiff's claim, even though the insurance company had an "arguable reason" to deny the plaintiff's claim and despite the absence of a finding of malice. *Id.*, at 1420. In *Horton* v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985), the court upheld a $520,000 punitive damage award against a gas company because a company employee had been negligent in determining the source of a gas leak in a home and because the company had been negligent in failing to revise its gas emergency plan. *Id.*, at 386-87. The dissent strongly criticized this "novel theory of adding together several ordinary negligence factors to make out a case of gross negligence" because the theory could encompass "a multitude of cases not ordinarily thought of as gross negligence." *Id.*, at 391, 392 (Stephenson, J., dissenting).[5]

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[5] *See also Bonsignore* v. *City of New York*, 521 F. Supp. 394, 397 (S.D.N.Y. 1981) (court upheld punitive award of $125,000 even though jury verdict was based solely on negligence), *aff'd*, 683 F.2d 635 (2d Cir. 1982); *First Interstate Development Corp.* v. *Ablanedo*, 511 So. 2d 536, 540 (Fla. 1987) (Overton, J., dissenting) (misrepresentation by developer did not have "additional circumstance of aggravation" to warrant punitive damages; to allow such an award "is a gross injustice under these circumstances"); *Sliman* v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267, 1280 (1986) (McFadden, J., dissenting) ("To claim [defendant] was wanton and reckless and acted with gross negligence [in failing to provide adequate warning about the potential blow-offs of bottle caps] for an occurrence that happened once in the use of 86 billion caps borders on the absurd."), *cert. denied*, 486 U.S. 1031 (1988); *Bud Wolf Chevrolet, Inc.* v. *Robertson*, 508 N.E.2d 567, 573 (Ind. Ct. App. 1987) (Buchanan, J., concurring in part and dissenting in part) (the "effect of the majority position is to allow punitive damages for . . . 'mistake of law or fact, honest error of judgment, overzealousness, mere negligence or other such noniniquitous human failing' ") (quoting *Travelers Indemnity Co.* v. *Armstrong*, 442 N.E.2d 349, 362 (Ind. 1982)), *vacated in part*, 519 N.E.2d 135 (Ind. 1988) (upheld punitive damage award); *Brown* v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677, 685 (1985) (court inferred a jury finding of "outrageous" conduct and upheld $200,000 punitive damage award even though jury verdict was based solely on negligence).

In *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279, slip op., at 15 (Mar. 4, 1991), this Court held that in some cases, "the Due Process Clause [could] render[ ] [a] punitive damages award . . . constitutionally unacceptable." An award of punitive damages for merely negligent conduct is such a case: it is fundamentally unfair because it imposes virtually unlimited punishment for unintentional acts, contrary to the assumption of the Framers of the Due Process Clause that punitive damages could not be imposed under such circumstances. Although this Court held in *Pacific Mutual* that Alabama's procedures for awarding punitive damages did not violate the Due Process Clause of the Fourteenth Amendment in the circumstances of that case, the Court's analysis was based on the application of those procedures to *intentional*, not *negligent*, acts.[6] The Court should grant this petition to determine the applicability of its decision in *Pacific Mutual* to cases involving mere negligence and to decide whether the process extended to punitive damage defendants charged with intentional conduct is sufficient, given centuries of rejection of the notion that punitive damages may be imposed at all for simple negligence, to ensure that awards of punitive damages for non-intentional conduct do not exceed a State's authority to punish such conduct.

A. The Court Should Grant the Writ to Decide Whether Punitive Damage Awards Based on Negligent, Unintentional, Non-Malicious Conduct Constitute a *Per Se* Violation of the Due Process Clause

For over two hundred years, American and English courts consistently have refused to award punitive damages for merely negligent conduct. This refusal reflects a common understanding that imposing punishment, such as punitive damages, for unintentional conduct serves no societal purpose and is fundamentally unfair. In light of the historical rejection and fundamental unfairness of punitive

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[6] As the Court stated, the award of punitive damages sustained in *Pacific Mutual* was for "intentional fraud." *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279, slip op., at 11 (U.S. Mar. 4, 1991).

damage awards for negligent, unintentional, non-malicious conduct, this Court should decide whether such awards, regardless of procedural safeguards that may be afforded to defendants, constitute a *per se* violation of the Due Process Clause.

1. Punitive damage awards for negligent, unintentional non-malicious conduct conflict with centuries of Anglo-American jurisprudence

Historical traditions have strongly influenced current concepts of due process of law. This Court has often been guided by settled judicial practice when determining the scope of the Due Process Clause. *See, e.g., Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Hurtado* v. *California*, 110 U.S. 516 (1884); *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). The Court most recently acknowledged the importance of history to explication of the requirements of due process in *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (U.S. Mar. 4, 1991). In that case, the Court's approval of Alabama's system of awarding punitive damages relied in significant measure on the historical acceptance of punitive damages in American and English courts of justice. Writing for the Court, Justice Blackmun observed that " '[p]unitive damages have long been a part of traditional state tort law.' " *Pacific Mutual*, slip op., at 12 (quoting *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984)). Justice Blackmun cited several eighteenth and nineteenth-century decisions of the courts of this country and of England[7] to demonstrate that "the common-law method for assessing punitive damages was well established before the Fourteenth Amendment was enacted," *id.*, at 14, and further noted that judicial acceptance of punitive damages has continued into this century, *see id.*, at 13-14. The Court concluded that, "[i]n view of this consistent history, we cannot say

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[7] *See Day* v. *Woodworth*, 54 U.S. (13 How.) 362 (1852); *Coryell* v. *Colbaugh*, 1 N.J.L. 77 (1791); *Genay* v. *Norris*, 1 S.C.L. (1 Bay) 6 (1784); *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763); *see also Pacific Mutual*, slip op., at 12-13.

that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional." *Id.*

Justice Scalia, concurring in the judgment, relied exclusively on the historical acceptance of punitive damages in Anglo-American jurisprudence:

> Since it has been the traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury; and *since in my view a process that accords with such a tradition and does not violate the Bill of Rights necessarily constitutes "due" process*; I would approve the procedure challenged here without further inquiry into its "fairness" or "reasonableness."

Pacific Mutual, slip op., at 1-2 (Scalia, J., concurring in the judgment) (emphasis added). Justice Scalia relied on both this Court's opinions and influential treatises[8] for his conclusion that "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts." *Id.*, at 3. Justice Scalia emphasized that his view was based solely on the more than two hundred-year history of punitive damage awards: "Although both the majority and the dissenting opinions today concede that the common-law system for awarding punitive damages is firmly rooted in our history, both reject the proposition that this is dispositive for due process purposes. I disagree." *Id.*, at 4 (citations omitted). Justice Kennedy's concurrence echoes the conclusions of Justice Scalia:

> I agree that the judgment of history should govern the outcome of the case before us. Jury de-

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[8] *See* G. Field, *The Law of Damages* 68 (1876); T. Sedgwick, *Measure of Damages* 35, 522 (4th ed. 1868); J. Sutherland, *Law of Damages* 721-22, 726-27 n.1 (1882); *see also Pacific Mutual*, slip op., at 2, 4 (Scalia, J., concurring in the judgment).

> termination of punitive damages has such long and principled recognition as a central part of our system that no further evidence of its essential fairness or rationality ought to be deemed necessary.

Pacific Mutual, slip op., at 1 (Kennedy, J., concurring in the judgment).

History is, however, a two-edged sword, and the judgment of history runs strongly contrary to the imposition of unlimited punitive damages for purely negligent conduct. Historically, punitive damages have been available only for conduct that was more than merely negligent. Indeed, punitive damage awards for simple negligence are irreconcilable with centuries of judicial precedent. As Justice Scalia observed,

> "the rule" with respect to the "salutary doctrine" of exemplary damages is that "where *gross fraud, malice*, or *oppression* appears, the jury are not bound to adhere to the strict line of compensation, but may, by a severer verdict, at once impose a punishment on the defendant and hold up an example to the community." T. Sedgwick, *Measure of Damages* 522 (4th ed. 1868).

Pacific Mutual, slip op., at 2 (Scalia, J., concurring in the judgment) (emphasis added); *see also Pacific Mutual*, slip op., at 20 (O'Connor, J., dissenting) (punitive damages "were reserved for the most reprehensible, outrageous, or insulting acts") (citing P. Huber, *Liability: The Legal Revolution and Its Consequences* 118 (1988); F. Pollack, *Law of Torts* (1887)). As demonstrated below, the Supreme Court of Alabama's decision conflicts with over two hundred years of judicial rejection of punitive damage awards for mere negligence, casting serious doubt on the constitutionality of such awards under the Due Process Clause.

By the time the Fifth Amendment became part of the Constitution in 1791, courts had established that punitive damages were available only if the conduct to be punished

was "of the most atrocious and dishonorable nature." *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 91 (1791). Under eighteenth and nineteenth century Anglo-American jurisprudence, both English[9] and American[10] courts limited the application of punitive damages to particularly egregious and intentional acts; mere negligence was *never* the basis of such awards.

This Court confirmed time and again this historically accepted constraint on the imposition of punitive damage awards. In *Day* v. *Woodworth*, 54 U.S. (13 How.) 362, 371 (1852), the Court observed that "where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff . . . something farther by way of punishment or example." The award "depend[ed] upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct." *Id.*, at 371. The Court further elucidated the role of punitive damages in *Philadelphia, Wilmington, & Baltimore R. Co.* v. *Quigley*, 62 U.S. (21 How.) 202, 214 (1858), in which it held that such damages may be awarded "[w]henever the injury . . . has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity." The Court was careful to specify that "malice" was not "merely the doing of an unlawful or injurious act"; rather, the act to be punished must have been "conceived in the spirit of mischief, or of criminal indifference to civil obligations." *Id.*, at 214. Prior to the ratification of the Fourteenth Amendment in 1868, therefore, the law unequivocally established by this Court and every state

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[9] *See Sears* v. *Lyons*, 171 Eng. Rep. 658 (1818) (wanton poisoning of poultry); *Tullidge* v. *Wade*, 95 Eng. Rep. 909 (K.B. 1769) (seduction of plaintiff's daughter); *Wilkes* v. *Wood*, 98 Eng. Rep. 489 (C.P. 1763) (false imprisonment by King's Messenger); *Huckle* v. *Money*, 95 Eng. Rep. 768 (K.B. 1763) (same).

[10] *See Linsley* v. *Bushnell*, 15 Conn. 225, 236 (1842) (punitive damages allowed "in cases of wanton or malicious injuries"); *Stone* v. *Codman*, 32 Mass. (15 Pick.) 297, 300 (1834) (forbidding punitive damages when action was not "a case of wilful wrong"); *Tillotson* v. *Cheetham*, 3 Johns. 55, 63 (N.Y. 1808) (allowing exemplary damages to address "evil example of libels").

court was that negligence was understood to be an insufficient predicate for the imposition of exemplary or punitive damages in civil actions brought by private persons.[11]

Less than a decade after ratification of the Fourteenth Amendment, this Court reemphasized its earlier decisions on this point and announced that "gross or ordinary negligence, [does] not authorize [a] jury to visit [a defendant] with [punitive damages]." *Milwaukee & Saint Paul R. Co.* v. *Arms*, 91 U.S. 489, 495 (1875). Finding error in a jury instruction that permitted a punitive award for gross negligence, the Court held that a jury may not award exemplary damages unless the tort "was done wilfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them." *Id.*, at 493. The Court rejected a gross negligence standard because it "was too vague, and too likely to be confused with mere ordinary negligence, to provide a fair standard." *Smith* v. *Wade*, 461 U.S. 30, 43 (1983). To emphasize that mere ordinary negligence was insufficient for punitive damages, the Court specifically stated that the "absence of [reasonable]" care did not authorize the jury to award punitive damages; to grant such an award, there would have to have been "some wilful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences." *Arms*, 91 U.S., at 495.

The same day that *Milwaukee & Saint Paul R. Co.* v. *Arms* was decided, this Court explicitly held that a negligent omission could not support an award of punitive damages. In *Western Union Telegraph Co.* v. *Eyser*, 91 U.S. 495, 496 (1875), the Court reversed a decision of the Supreme Court of the Territory of Colorado, holding that

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[11] The commentators of that era reflected the Court's position. *See, e.g.*, 1 J. Kent, *Commentaries on American Law* 618 n.a (8th ed. 1854) ("in cases of loss without aggravation or intentional wrong, the law confines itself to a complete indemnity, without adding exemplary damages"); T. Sedgwick, *Measure of Damages* 545 & n. † (4th ed. 1868) (even fraud is insufficient to support punitive damages unless it is "accompanied by gross malice and manifest design to injure").

while the "omission" to give "proper warning" when men were constructing a telegraph line warranted an award of compensatory damages, "[i]n no view of the evidence was the court below justified in instructing the jury that exemplary damages could be recovered." Because there was no evidence "to authorize the jury to consider this omission as wilful"—indeed, the evidence "rebut[ted] every presumption that there was any intentional wrong"—the judgment awarding exemplary damages was reversed. *Id.*[12]

Thus, this Court historically has refused to condone awards of punitive damages for mere negligent behavior.[13] This Court's decisions, of course, reflected state court decisions of the nineteenth century, which generally held that punitive damages "may be awarded where the negligence is so gross as to raise a presumption, that the person in fault, is conscious of the probable consequences of his care-

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[12] *See also Scott* v. *Donald*, 165 U.S. 58, 86 (1897) (punitive damages allowed "where a tort is aggravated by evil motive, actual malice, deliberate violence or oppression"); *Lake Shore & Michigan Southern Railway Co.* v. *Prentice*, 147 U.S. 101, 107 (1893) (it is "well settled" that a jury may award punitive damages "if the defendant has acted wantonly, or oppressively, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations"); *Missouri Pacific Railway Co.* v. *Humes*, 115 U.S. 512, 521 (1885) (dictum) (punitive damages allowed "whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury").

[13] The Court has recently had several occasions upon which to reaffirm its refusal to award punitive damages for mere negligence. *See, e.g., Smith* v. *Wade*, 461 U.S. 30, 56 (1983) ("a jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference"); *id.*, at 69 (Rehnquist, J., dissenting) (awarding punitive damages for "simple negligence" would be a "remarkable proposition"); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (Blackmun, J.) ("Punitive damages by definition are . . . intended . . . to punish the tortfeasor whose wrongful action was intentional or malicious . . . ."); *International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S. 42, 48 (1979) (Marshall, J.) (punitive damages " 'are private fines levied by civil juries to punish reprehensible conduct' ") (quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)).

lessness, and is indifferent, or worse, to the danger of injury to the persons, or property of others. It is only in cases of such recklessness . . . [that] exemplary damages should be allowed." *Memphis & Charleston R. Co.* v. *Whitfield*, 44 Miss. 466, 495 (1870). Alabama Power has included as App. G, *infra*, 47a-54a, a list of eighty-six reported cases from the eighteenth and early nineteenth centuries that demonstrate the overwhelming acceptance of this principle. In the words of one court, punitive damages could be awarded only "if [the misconduct] was wantonly or willfully inflicted, or with such gross want of care and regard for the rights of others as to *justify the presumption of willfulness or wantonness.*" *Citizens' Street Railway* v. *Steen*, 42 Ark. 321, 329 (1883) (emphasis in original). Even Alabama courts of that era recognized that "to maintain a claim for exemplary, or punitive damages, the negligence must be wilful, wanton, or reckless." *Alabama Great Southern R. Co.* v. *Arnold*, 84 Ala. 159, 169, 4 So. 359 (1887).[14] English courts of the nineteenth century were equally careful not to award punitive damages for mere negligence. *See, e.g., Doe* v. *Filliter*, 153 Eng. Rep. 20, 21 (Ex. 1844) ("In actions for malicious injuries, juries have been allowed to give what are called vindictive damages"); *Emblen* v. *Myers*, 158 Eng. Rep. 23, 25 (1860) (allowing punitive damages in case of "wilful negligence," one "accompanied with expressions of insolence" and "with a high hand"). This widespread judicial rejection of puni-

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[14] *See also Lienkauf & Strauss* v. *Morris*, 66 Ala. 406, 413 (1880) ("In no case, however, as we think, can exemplary or punitive damages be recovered, on any thing less than *gross negligence* within the strictest signification of the phrase; which must be construed to mean 'such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others' ") (quoting T. Shearman & A. Redfield, *Law of Negligence* § 600, at 684 (3d ed. 1874)). The Supreme Court of Alabama nevertheless inexplicably approved punitive damage awards based on negligence in wrongful death cases. *See Richmond & Danville R.* v. *Freeman*, 97 Ala. 289, 11 So. 800 (1892). Given the contrary position of every other jurisdiction during this era, Alabama's approach is clearly an aberration.

tive damage awards for mere negligence has, until recently, continued into modern times.[15]

Commentators of the nineteenth and early twentieth centuries also were in agreement that a "tort committed by mistake . . . or without anv actual wrong intention, and without such recklessness or negligence as evinces malice or conscious disregard of the rights of others, will not warrant the giving of damages for punishment." 2 J. Sutherland, *Law of Damages* § 393, at 1095 (3d ed. 1903). As one of the most influential commentators stated, "[m]ere negligence, even though it may be called gross, without the element of conscious disregard of consequences, is not enough to justify . . . exemplary damages." T. Sedgwick, *Measure of Damages* § 363, at 712, § 768, at 725 (9th ed. 1912).[16]

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[15] *See, e.g., Tri-Aspen Construction Co.* v. *Johnson*, 714 P.2d 484, 488 (Colo. 1986) ("Conduct that is merely negligent, however, cannot serve as the basis for exemplary damages."); *Johnson* v. *Geer Real Estate Co.*, 239 Kan. 324, 720 P.2d 660, 664 (1986) ("Simple negligence, standing alone, will not support an award of punitive damages."); *Tuttle* v. *Raymond*, 494 A.2d 1353, 1360-61 (Me. 1985) ("mere negligence cannot support an award of punitive damages"; conduct must exhibit "express" or "actual" malice); *Hood* v. *Fulkerson*, 102 N.M. 677, 699 P.2d 608, 611 (1985) ("Punitive damages cannot be established by mere negligence."); *Behrens* v. *Raleigh Hills Hospital, Inc.*, 675 P.2d 1179, 1186 (Utah 1983) ("Punitive damages should be awarded infrequently. Simple negligence will never suffice as a basis upon which such damages may be awarded."); *Wallen* v. *Allen*, 231 Va. 289, 343 S.E.2d 73, 78 (1986) ("Punitive damages do not arise from ordinary negligence.").

[16] *See also* G. Field, *The Law of Damages* § 84, at 90-91 (1876) ("to entitle the plaintiff to recover exemplary damages, the negligence should be flagrant and culpable, or the circumstances of the case must show a reckless indifference to duty, and to the security of the lives and limbs of persons, or their property, from which malice may be inferred"); W. Hale, *Law of Damages* §§ 89-90, at 312, 313 n.35 (2d ed. 1912) ("Exemplary damages cannot be recovered for accidental or unintentional injuries."); F. Hilliard, *Remedies for Torts* § 8, at 600 (2d ed. 1873) (exemplary damages may be given "if the injury was inflicted wilfully, wantonly, or maliciously"); C. McCormick, *Law of Damages* § 79, at 280 (1935) ("a positive element of conscious wrongdoing is always required" for exemplary damages); T. Shearman & A. Redfield,

In *Smith* v. *Wade*, 461 U.S. 30 (1983), this Court acknowledged that punitive damages historically have not been awarded for merely negligent conduct. Writing for the majority, Justice Brennan stated that "the policy judg-

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Law of Negligence § 600, at 684 (3d ed. 1874) ("punitive damages can never be recovered in actions upon anything less than gross negligence . . . [which] should be distinctly understood [to mean] such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others"); 6 S. Thompson, *Law of Negligence* § 7165, at 248-49 (2d ed. 1905) ("Liability for punitive damages rests primarily upon *wrong motive*, and such damages are recoverable only where the injury was *wantonly and willfully inflicted*, or *with* a *reckless indifference to the rights of others*") (emphasis in original); H. Wood, *Wood's Mayne on Damages* § 48, at 57 n.4 (3d English & 1st American ed. 1880) ("In the case of negligence simply, or any tort not accompanied with malice, fraud or wilfulness, the recovery should be restricted to *actual* damages") (emphasis in original).

Recent commentators echo these views:

> Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton. There is general agreement that, because it lacks this element, mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross" . . . .

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on the Law of Torts* 9-10 (1984) (citations omitted), *cited in International Brotherhood of Electrical Workers* v. *Foust*, 442 U.S., at 48 n.10; *see also* D. Dobbs, *Law of Remedies* § 3.9, at 206 (1973) (to award punitive damages for negligence, "the negligence must be so gross as to evince the defendant's conscious or criminal indifference to the safety or rights of others, or that the negligence must be 'wanton' "), *cited in Foust*, 442 U.S., at 48 n.10; *Restatement (Second) of Torts* § 908 & comment b (1979) (punitive damages are warranted for "outrageous conduct" or "because of the defendant's evil motive or his reckless indifference"; punitive damages "are not awarded for . . . ordinary negligence"), *cited in Smith* v. *Wade*, 461 U.S., at 54.

ment of the common law [was] that reckless or callous disregard for the plaintiff's rights, as well as intentional violations of federal law, should be sufficient to trigger a jury's consideration of the appropriateness of punitive damages." *Id.*, at 51.[17]

Since the middle of the eighteenth century, therefore, American and English courts and commentators have agreed almost unanimously that mere simple negligence could not support an award of punitive damages. Clearly, such awards offended traditional notions of fundamental fairness, the very notions that have become the hallmark of the Due Process Clause. The Court should decide whether this overwhelming historical rejection mandates that punitive damage awards for negligent, unintentional, non-malicious conduct are so fundamentally unfair, regardless of procedural safeguards that may be afforded to the many defendants actually or potentially subjected to such punishment, that they constitute a *per se* violation of the Due Process Clause.

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[17] In *Smith* v. *Wade*, Justice Brennan and then Justice Rehnquist debated whether the lower courts' use of words such as "malice," "wanton," and "gross negligence" evinced a requirement of intentional conduct for the imposition of punitive damages. *Compare* 461 U.S., at 45 (Brennan, J.) ("The large majority of state and lower federal courts . . . permitted punitive awards . . . [for] culpable conduct short of actual malicious intent.") *with id.*, at 84 (Rehnquist, J., dissenting) ("a solid majority of jurisdictions followed the rule that punitive damages require some element of 'evil motive,' 'wickedness,' or 'formed design to injure and oppress' "). Not even Justice Brennan, however, concluded that mere negligence, without more, would suffice. *See id.*, at 51 ("reckless or callous disregard" or "intentional violation" is required for an award of punitive damages). While some courts did use language suggesting mere recklessness was sufficient to warrant a punitive award, this conduct, in reality, appears to have amounted to willful conduct, and not merely gross indifference. *See Bannon* v. *Baltimore & Ohio R. Co.*, 24 Md. 108, 124 (1866) ("gross negligence . . . is a violation of good faith . . . [i]t implies malice and evil intention"). This debate, although instructive, is irrelevant to the instant case. Because the jury verdict form in the case at bar unequivocally establishes that the jury found that petitioner had been merely negligent, and not wanton, the issue whether gross negligence, or some other standard between negligence and intent, would suffice is not presented by this case.

2. Punitive damage awards for negligent, unintentional, non-malicious conduct violate the fundamental notions of fairness embodied in the due process clause

The notion of fundamental fairness permeates the requirements of the Due Process Clause. The gravamen of this notion is that state governments must be prevented from treating their citizens arbitrarily. A state's procedures for assessing punishment, therefore, must ensure that the resulting punishment is commensurate with the offending act. In *Pacific Mutual Life Insurance Co.* v. *Haslip*, slip op., at 15, this Court held that in some cases, "the Due Process Clause [could] render[ ] [a] punitive damages award . . . constitutionally unacceptable." An award of punitive damages for merely negligent conduct is such a case: it is fundamentally unfair because, absent due process constraints, it permits virtually unlimited punishment for unintentional acts.[18] This Court should decide in this case whether any award of punitive damages for mere negligence, and particularly the excessive award assessed against petitioner, exceeds a state's constitutional limit to punish unintentional conduct.

An indispensable tenet of American jurisprudence is that punitive sanctions, which exist to serve society's interest in deterrence and punishment, must be limited to intentional or malicious misconduct.[19] "The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Dennis* v. *United States*, 341 U.S. 494, 500 (1951). Punishment, therefore, must focus on an individual's *culpability* for the offending conduct, not on its *effects*. *Smith* v. *Wade*, 461 U.S., at 54.

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[18] Alabama Power notes that the court below could, with the stroke of its pen, reinterpret Alabama's wrongful death statute to provide for compensatory damages and thereby bring Alabama's wrongful death statute into line with similar legislation in the other 49 States.

[19] *See* C. McCormick, *Law of Damages* §§ 77-78 (1935).

Negligent acts, by definition, are not intentional, evil or malicious, so punishing them serves no societal interest and is fundamentally unfair:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morissette v. *United States*, 342 U.S. 246, 250 (1952). The actor's mental state is the controlling factor:

> [W]hen there has been no intentional offense committed, when a party has only done what he honestly believed to be his duty, punishment is not deserved. There is no occasion for an example, for none is necessary. It is only to cases of moral wrong, recklessness or malice that this public consideration applies.

Hamilton v. *Third Avenue R. Co.*, 53 N.Y. 25, 30 (1873). As then Justice Rehnquist observed:

> "If a cow kicks a man in the face, the consequent physical hurt may equal that from a kick in the face with a hob-nailed boot, but the 'cussedness' of the cow raises no sense of outrage, while the malicious motive back of the boot kick adds materially to the victim's sense of outrage."

Smith v. *Wade*, 461 U.S., at 65 n.5 (Rehnquist, J., dissenting) (quoting *Wise* v. *Daniel*, 221 Mich. 229, 233, 190 N.W. 746, 747 (1922)).[20]

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[20] Punishing negligence also creates a substantial vagueness problem because the prohibited conduct will not usually be defined with sufficient particularity in advance. The "reasonable person" standard governing the law of negligence is constantly evolving and is extremely fact specific. In many instances, a person would not be able to determine or predict what the "reasonable person" would do in a given situation before a jury has addressed that very situation.

Punitive damages under Alabama's wrongful death statute are penal in nature; they serve as "(1) punishment based on the quality of the wrong, and (2) punishment based upon the wrong or degree of culpability." *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986).[21] Like other forms of punishment, the "focus [for an award of punitive damages] is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Smith* v. *Wade*, 461 U.S., at 54.[22] A punitive damage award for mere negligence, however, would not be directed at the tortfeasor's culpability because no culpability exists.

As discussed above, this Court consistently has admonished that punitive damage awards for mere negligence are unfair. The vast majority of state courts have also recognized the inherent injustice of punishing negligent acts and, as described above, are nearly unanimous in their rejection of punitive damages for mere simple negligence. Even in products liability cases, for which compensatory damages are awarded on a strict liability standard, state courts generally do not award punitive damages unless the defendant has acted with some degree of intent, malice,

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[21] The vast majority of other states also award punitive damages for penal purposes. *See, e.g., Dyna-Med, Inc.* v. *Fair Employment & Housing Commission*, 43 Cal. 3d 1379, 1387, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987) ("Punitive damages . . . are neither equitable nor corrective; punitive damages serve but one purpose—to punish and through punishment, to deter."); *Johnson* v. *Geer Real Estate Co.*, 239 Kan. 324, 720 P.2d 660, 663 (1986) (" 'Punitive damages . . . are imposed to punish the wrongdoer for malicious, vindictive or willful and wanton invasion of the injured party's rights . . . . ' ") (quoting *Wooderson* v. *Ortho Pharmaceutical Corp.*, 235 Kan. 387, 681 P.2d 1038, *cert. denied*, 469 U.S. 965 (1984)); *Nast* v. *Lockett*, 312 Md. 343, 539 A.2d 1113, 1116 (1988) ("Punitive or exemplary damages are . . . awarded . . . 'as punishment for outrageous conduct and to deter future transgressions.' ") (quoting *Black's Law Dictionary* 352 (5th. ed. 1979)).

[22] *See also* D. Dobbs, *Law of Remedies* § 3.9, at 206 (1973) ("punitive damages are to be awarded because of the defendant's culpable state of mind, not because of extreme conduct standing alone").

or recklessness. *See, e.g., Masaki* v. *General Motors Corp.*, 780 P.2d 566, 572-73 (Haw. 1989) ("punitive damages may . . . be properly awarded in a products liability action based on the underlying theory of strict liability where the plaintiff proves the requisite aggravating conduct" of willfulness or wantonness); *Lugo* v. *LJN Toys, Ltd.*, 146 A.D.2d 168, 539 N.Y.S.2d 922, 925 (1989) (defendant must act with "evil or wrongful motive or with a willful and intentional misdoing, or with a reckless indifference equivalent thereto"), *aff'd*, 552 N.Y.S.2d 914 (1990); *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W.2d 437, 442 (1980) (punitive damages allowed in strict liability actions when accompanied by "malicious conduct or willful or wanton conduct in reckless disregard of rights or interests").[23] Congress has followed the courts' lead: Alabama Power has not identified any federal statutes that award punitive damages in the absence of some degree of intent, willfulness, wantonness, or maliciousness. *See, e.g.*, 11 U.S.C. § 362(h) (1988) (individual injured by "willful violation" of Bankruptcy Act's automatic stay provision may recover punitive damages); 12 U.S.C. § 3417(a)(3) (1988) (punitive damages may be awarded against United States where agency willfully or intentionally obtains or discloses financial records or information).[24] Indeed, many such statutes

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[23] States also generally require some degree of intent in products liability cases that are decided under a negligence standard. *See, e.g., Volz* v. *Coleman Co.*, 155 Ariz. 567, 748 P.2d 1191, 1194 (1987) ("evil mind"); *Forest City Machine Works, Inc.* v. *Aderhold*, 273 Ark. 33, 616 S.W.2d 720, 726 (1981) ("reckless disregard from which malice can be inferred"); *Rinker* v. *Ford Motor Co.*, 567 S.W.2d 655, 668 (Mo. App. 1978) (requiring a conscious or knowing disregard of a genuine potential for danger); *Scott* v. *Freuhauf Corp.*, 396 S.E.2d 354, 357 (S.C. 1990) ("Punitive damages are recoverable in a [products liability] negligence cause of action when the defendant's conduct rises to the level of a willful, wanton, or malicious violation of the plaintiff's rights.").

[24] *See also* 15 U.S.C. § 1681n (1988) ("any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed . . . with respect to any customer" may be liable to that customer for punitive damages); 42 U.S.C. § 300aa-23(d) (1988) (plaintiff may be awarded punitive damages if vaccine manufacturer engaged in

expressly limit the amount of the award. *See, e.g.*, 15 U.S.C. § 1691e(b) (1988) (punitive damages under the Equal Credit Opportunity Act limited to $10,000); 45 U.S.C. § 711(j) (1988) (punitive damages limited to $100 per day for improper use of "United States Railway Association" name).[25] Given the broad scope of this judicial and legislative acknowledgment of the unfairness of punitive damage awards for merely negligent conduct, this Court should decide whether such awards are so fundamentally unfair that they could never satisfy the requirements of the Due Process Clause.

"fraud or intentional and wrongful withholding of information" or "other criminal or illegal activity").

[25] *See also* 35 U.S.C. § 284 (1988) (treble damages for infringement of Patent Act); 42 U.S.C. § 9607(c)(3) (1988) (treble damages for failure to comply with CERCLA removal or remedial order). The federal government is empowered to impose civil penalties for violations of certain federal statutes or regulations on a strict liability standard, but such penalties are part of a regulatory scheme for the purpose of protecting the public from specific health and safety risks and are very small. *See, e.g.*, 21 U.S.C. § 117(b) (1988) (penalty of up to $1,000 for transportation of diseased stock or poultry); 29 U.S.C. § 666(c) (1988) (penalty of up to $1,000 for non-serious violation of OSHA); 49 U.S.C. § 11901(b) (1988) (common carrier liable for general civil penalty of $500). Strict liability crimes are also distinguishable because they are limited to clearly defined regulatory offenses for which a strict liability standard is deemed essential to protect the public. *See, e.g., United States* v. *Freed*, 401 U.S. 601 (1971) (possession of unregistered hand grenades); *United States* v. *Dotterweich*, 320 U.S. 277 (1943) (distribution of adulterated drugs); *United States* v. *Balint*, 258 U.S. 250 (1922) (sale of opium derivative). Such crimes "are principally directed at social betterment rather than punishment." *United States* v. *Halper*, 490 U.S. 435, 448 n.8 (1989). A strict liability standard for these "public welfare offenses" has been justified on the grounds that the "penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation." *Morissette* v. *United States*, 342 U.S. 246, 255, 256 (1952). In contrast, punitive damages are awarded under Alabama's wrongful death statute on the nebulous "reasonable person" standard, for penal purposes, and in virtually unlimited amounts.

B. The Court Should Grant the Writ to Decide Whether Punitive Damage Awards for Negligent, Unintentional, Non-Malicious Conduct Must Be Subject to More Exacting Due Process Requirements than Those that Apply to Intentional Conduct

As discussed above, the principles of fundamental fairness embodied in the Due Process Clause foreclose *any* award of punitive damages for mere negligence. Even if this Court does not find such awards to be *per se* unconstitutional, the requirements of the Due Process Clause dictate that punitive damage awards for negligent conduct must be more carefully restrained than punishment for intentional conduct. To ensure this constitutionally mandated result, the due process requirements governing the imposition of punitive awards for mere negligence must be more exacting than those that apply to intentional conduct and which this Court approved in *Pacific Mutual Life Insurance Co.* v. *Haslip*. Because the objective in establishing more stringent due process requirements is to eliminate or substantially constrain jury discretion to punish negligent conduct more severely than intentional conduct, monetary limits for specific types of non-intentional conduct must be imposed on punitive damage awards for simple negligence.

Any punitive sanction imposed on negligent conduct would be fundamentally unfair, but if punishment is imposed, that punishment must be commensurate with the degree of culpability. "The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U.S. 277, 284 (1983). The Excessive Fines Clause of the Eighth Amendment manifests a common understanding that has existed since presentation of Magna Carta to King John in 1215 that the degree of punishment must be appropriate to the degree of the wrongdoing. The penalty for negligent conduct, which involves no culpability, must therefore be less than the penalty for intentional conduct. As this Court has clearly admonished, "[i]t is fundamental that 'causing harm intentionally must be pun-

ished more severely than causing the same harm unintentionally.' " *Enmund* v. *Florida*, 458 U.S. 782, 798 (1982) (quoting H. Hart, *Punishment and Responsibility* 162 (1968)).

In *Holdridge* v. *United States*, 282 F.2d 302 (8th Cir. 1960), then Judge Blackmun analyzed the appropriate degree of punishment for conduct that was not motivated by wrongful intent. He concluded that punishing such conduct "is . . . not violative of the due process clause" only if, *inter alia*, "the penalty is relatively small." *Id.*, at 310. He also emphasized that the penalizing law must be "basically a matter of policy," a "statute of prohibition rather than of punishment." *Id.* Accordingly, "punishment" of non-intentionally motivated misconduct cannot be punishment at all, but must be confined to regulatory activity that has the sole purpose of prohibiting, rather than punishing, certain acts. Given such a situation, a "relatively small" penalty, but no more, is justified.

Punitive damage awards constitute punishment, so such an award for negligent conduct must not only be less than for intentional conduct, but must also be "relatively small." The $3,500,000 punitive damage award for unintentional conduct that was upheld in this case is the exact opposite of "relatively small." Indeed, it is excessive: the award is more than four times greater than the $840,000 punitive damage award for intentional fraud upheld in *Pacific Mutual Life Insurance Co.* v. *Haslip*. If $840,000 for intentional conduct "may be close to the line . . . of constitutional impropriety," $3,500,000 for mere negligence surely must "cross the line." *Pacific Mutual*, slip op., at 20.

A comparison of the award in this case with punitive damage awards in other cases in the Alabama courts evidences the gross unfairness of the punishment that has been imposed on Alabama Power. Shockingly, the award in this case is greater than any punitive damage award for *intentional* conduct by one defendant against one plaintiff that petitioner has been able to identify. *See, e.g.*,

Schwertfeger v. *Moorehouse*, 569 So. 2d 322 (Ala. 1990) ($25,000 for willful conversion of vending machine); *Ocean Cruise Lines, Inc.* v. *Abeta Travel Service, Inc.*, 562 So. 2d 205 (Ala. 1990) ($150,000 for wanton misconduct and fraudulent concealment); *City Bank of Alabama* v. *Eskridge*, 521 So. 2d 931 (Ala. 1988) ($62,500 for fraud by bank in agreeing to waive penalty and then assessing penalty); *Southern Life & Health Insurance Co.* v. *Smith*, 518 So. 2d 77 (Ala. 1987) ($35,000 for intentional misrepresentation); *Treadwell Ford, Inc.* v. *Sarris*, 510 So. 2d 535 (Ala. 1987) ($20,000 for willful and reckless misrepresentation); *Underwood* v. *Hall*, 572 So. 2d 490 (Ala. Civ. App. 1990) ($10,000 for assault and battery). In the vast majority of cases, punitive damages that have been awarded under Alabama's wrongful death statute have been substantially less than the award in this case. *See, e.g., Alabama Power Co.* v. *Capps*, 519 So. 2d 1328 (Ala.) ($500,000), *appeal dismissed*, 486 U.S. 1002 (1988); *Lane* v. *Otts*, 412 So. 2d 254 (Ala. 1982) ($500,000); *Estes Health Care Centers, Inc.* v. *Bannerman*, 411 So. 2d 109 (Ala. 1982) ($500,000); *Dees* v. *Gilley*, 339 So. 2d 1000 (Ala. 1976) ($50,000); *General Telephone Co. of Alabama* v. *Cornish*, 291 Ala. 293, 280 So. 2d 541 (1973) ($75,000); *Magnusson* v. *Swan*, 291 Ala. 151, 279 So. 2d 422 (1973) ($50,000). The punishment imposed on petitioner exceeds even the amount of punitive damages that Alabama juries have awarded for *wantonness* in wrongful death actions. *See, e.g., Deaton, Inc.* v. *Burroughs*, 456 So. 2d 771, 775-76 (Ala. 1984) ($835,000 award based on wantonness). Petitioner is aware of only one punitive damage award that an Alabama jury has assessed against a single defendant for a single plaintiff that exceeded the $3,500,000 award in this case.[26] The constitutional infirmity of the punitive award in this case is highlighted by the fact that the award is 70 times greater than the maximum

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[26] *Burlington Northern R. Co.* v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988) (affirming $5,000,000 punitive damage award, after remittitur, under wrongful death statute), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250).

fine ($50,000) authorized by the Alabama legislature for any single offense[27] and 1,750 times greater than the maximum fine ($2,000) for the most closely analogous criminal offense, negligent homicide.[28]

Clearly, the $3,500,000 punitive damage award was not imposed on Alabama Power under a "statute of prohibition rather than of punishment," but as a result of a system that encourages juries to punish unintentional conduct by granting them broad discretion to assess punitive damages in virtually unlimited amounts. In *Pacific Mutual*, which involved an intentional tort, this Court held that Alabama's procedures for limiting a jury's discretion to award punitive damages were sufficient for due process purposes. The Court, however, was not presented the question whether such procedures would be adequate as applied to mere negligence. As seen by the $3,500,000 punitive damage award that was upheld in this case, Alabama's procedures grant juries broad discretion, which virtually guarantees that punitive damage awards for mere negligence will exceed punitive damage awards for intentional conduct, even though, as Justice Powell observed for the Court in *Solem* v. *Helm*, 463 U.S., at 293, "negligent conduct is less serious than intentional conduct."[29] Given that

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[27] *Alabama Code* § 22-30-19 (Supp. 1990) (violation of hazardous waste regulations).

[28] *Alabama Code* §§ 13A-5-7, 13A-5-12, 13A-6-4 (1975) (maximum of one-year confinement may also be imposed). Other states impose similarly low fines for negligent homicide or involuntary manslaughter. *See, e.g., Arkansas Stat. Ann.* §§ 5-4-201(b)(1), 5-10-105(b) (1987) ($1,000 maximum fine for negligent homicide); *Georgia Code Ann.* §§ 16-5-3(b), 17-10-3(a)(1) (1988) ($1,000 maximum fine for involuntary manslaughter); *Louisiana Rev. Stat. Ann.* § 14:32 (West 1986) ($5,000 maximum fine for negligent homicide).

[29] This problem is exacerbated by the jury's inability to use compensatory damages as a yardstick for awarding punitive damages. In *Pacific Mutual*, this Court noted the importance of the ratio of punitive damages to compensatory damages when analyzing the issue of due process. *Pacific Mutual*, slip op., at 20. Such an analysis is impossible under Alabama's wrongful death statute, however, because the statute has been construed to allow only punitive damages.

this Court has mandated that intentional conduct be punished more severely than unintentional conduct, the Court should decide whether Alabama's procedures can ensure such a result or if more exacting restraints are necessary.[30]

The only way to ensure that punitive damage awards for mere negligence will not exceed those for intentional conduct is to impose stricter controls over jury discretion to award punitive damages for negligence than apply in intentional conduct cases. The Alabama legislature has limited punitive damage awards for most intentional, malicious, or wanton misconduct to $250,000. As a matter of federal due process and equal protection guaranteed by the Equal Protection Clause of the Fourteenth Amend-

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[30] Although this Court previously upheld the constitutionality of Alabama's wrongful death statute in *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112 (1927), that decision is not controlling on the instant case for two reasons. First, the issue in *Pizitz* was the vicarious liability of the tortfeasor's employer. In holding that the employer could be liable for punitive damages on account of his employee's negligence, the Court assumed, without addressing the issue, that the employee himself could have been liable for such damages based upon his negligent conduct. The Court therefore limited its analysis to the constitutionality of imposing such liability on a *respondeat superior* basis. *Id.*, at 114-15. The instant case tests the Court's uncritical assumption in *Pizitz* that a negligent tortfeasor could be liable for punitive damages. Second, the Court's decision in *Pizitz* was based in large measure on its assumption that Alabama's wrongful death statute was " 'remedial, and not penal.' " *Id.*, at 114 (quoting *Southern Railway Co.* v. *Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899)). In addressing the statute's constitutionality, the Court stated that "[t]he case was argued here on the assumption that [the statute's] scope was thus limited [to remedial purposes] and we so interpret the statute." *Id.*, at 115. The Supreme Court of Alabama, however, has recently confirmed that the wrongful death statue is penal, not remedial, in nature. *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1262 (Ala. 1986). This conclusion is required as a matter of federal constitutional law by the availability of only punitive, and not compensatory, damages under the statute. *Id.*, at 1261-62. The Court's constitutional analysis in *Pizitz*, therefore, was premised on an understanding of Alabama's wrongful death statute that is no longer valid. As demonstrated by the fact that this Court has never cited its decision in *Pizitz* for the proposition that punitive damages may be awarded for mere negligence, *Pizitz* is inapplicable to the instant case.

ment, punitive damage awards under Alabama's wrongful death statute for mere negligence must be proportional to and less than the maximum punishments available for intentional torts. For example, the Court in this case should consider whether, to ensure this result, due process requires that punitive damage awards for negligence be limited to the maximum fine for the most comparable crime, which, for wrongful death actions, would be negligent homicide. The inability to imprison a wrongful death defendant, unlike a criminal negligence defendant, does not render the maximum fine for criminal negligence an inappropriate guide for the imposition of punitive damages for negligent conduct. In a similar context, the inability to imprison corporate defendants has prompted some states to proportionally increase the fines that corporate defendants would pay. *See Illinois Ann. Stat.* ch. 38, para. 1005-9-1(a)(1) (Smith-Hurd 1983) (increasing $10,000 fine for felony to $50,000 for corporate defendants); *Missouri Ann. Stat.* § 560.011(1)(2) (Vernon 1979) (assessing fine for certain felonies on corporate defendant on basis of corporation's gain, but limiting fine for individual offender to $20,000). Alternatively, for those States that have enacted a statutory cap on punitive damages, the Court should consider limiting punitive damage awards for mere negligence to some reasonable proportion of the statutory maximum governing punitive damage awards for intentional acts.

CONCLUSION

This Court has an obligation not only to get its history right but to apply the lessons and dictates of history to the interpretation of the Due Process Clause in an even-handed fashion. The courts of Alabama and several other States have directly and recently addressed the propriety of imposing punitive damages for negligent, unintentional, non-malicious conduct and have, contrary to centuries of practice to the contrary, held that such awards do not violate due process. Only this Court can resolve whether punitive damages for negligent, unintentional, non-mali-

cious conduct violate due process or, if they do not, what due process constraints must guide their imposition beyond the process afforded in *Pacific Mutual*. These questions are important, implicate a growing spectrum of civil litigation in which punitive damages have been and may be awarded for mere negligence, and should be decided in this case.

April 11, 1991

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1990-91

89-408

Alabama Power Company

v.

Gerald L. Turner, as administrator of the estate of Kenneth Allen Turner, deceased

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Appeal from Montgomery Circuit Court
(CV-88-1700)

ALMON, JUSTICE.

Gerald Turner, as administrator, filed this wrongful death action against Alabama Power Company ("Alabama Power") after his son, Kenneth Turner, who was a truck driver, was electrocuted when the rear door of his parked truck came in contact with an energized guy wire as he attempted to close the door. A jury found Alabama Power guilty of negligence and awarded Turner $5,000,000. The trial court entered a final judgment in that amount and, following a hearing consistent with *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1966), denied Alabama Power's motions for new trial and for j.n.o.v..

Alabama Power contends that the judgment deprives it of its property in violation of the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, §§ 6 and 13, of the Alabama Consti-

tution; deprives it of its rights under the Fourth, Fifth, Sixth, and Eighth Amendments of the United States Constitution; and deprives it of equal protection of the laws.

The issue of the constitutionality of awarding punitive damages under the Alabama wrongful death statute has been raised in this Court numerous times in recent years. See, e.g., *Kumar v. Lewis*, 561 So. 2d 1082 (Ala. 1990); *Olympia Spa v. Johnson*, 547 So. 2d 80 (Ala. 1989); *Central Alabama Elec. Co-op v. Tapley*, 546 So. 2d 371 (Ala. 1989); *Alabama Power Co. v. Courtney*, 539 So. 2d 170 (Ala. 1988); *Alabama Power Co. v. Capps*, 519 So. 2d 1328 (Ala. 1988), appeal dismissed, ___ U.S. ___, 108 S. Ct. 1723, ___ L.Ed.2d ___ (1989); *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295 (Ala. 1986); *Merrell v. Alabama Power Co.*, 382 So. 2d 494 (Ala. 1980). However, in several of those cases the constitutional issue was not properly presented for review. For example, in *Alabama Power Co. v. Capps, supra*, we recognized the following fundamental principle of appellate procedure:

> "An appellant cannot invoke action by a court and have a case tried on certain issues and then later, when dissatisfied with the result, raise an entirely new issue, such as the constitutionality of the statutes under which he was proceeding, on motion for a new trial."

519 So. 2d at 1330; *see also, Alabama Power Co. v. Courtney, supra*. In order for an appellate court to review a constitutional issue, that issue must have been raised by the appellant and presented to and reviewed by the trial court. *Healthamerica v. Menton*, 551 So. 2d 235 (Ala. 1989); *Marion v. Hall*, 429 So. 2d 937 (Ala. 1983); *Stephens v. Central of Georgia R.R.*, 367 So. 2d 192 (Ala. 1979). Additionally, in order to challenge the constitutionality of a statute, an appellant must identify and make specific arguments regarding what specific rights it claims have been violated. *Central Alabama Elec. Co-Op. v. Tapley, supra.*

I. Fourth, Fifth and Sixth Amendments

Alabama Power's argument that the judgment violates its rights under the Fourth, Fifth, and Sixth Amendments does not identify any specific right it believes has been violated. Alabama Power has also failed to make any specific arguments regarding its constitutional challenges under any of these amendments. As a result, this Court will not address those arguments. Ala. R. App. P. 28 (a)(5); *Hickox v. Stover*, 551 So. 2d 259 (Ala. 1989); *Tapley, supra*. However, Alabama Power's argument based on due process under the Fourteenth Amendment and its Eighth Amendment argument have been properly presented and will be addressed.

II. Eighth Amendment

Alabama Power contends that punitive damages awards under Alabama's wrongful death statute constitute "excessive fines" and therefore violate the Eighth Amendment. This Court has specifically and repeatedly rejected this argument. *Kumar v. Lewis*, 561 So. 2d 1082 (Ala. 1990); *Central Alabama Elec. Co-Op. v. Tapley, supra; Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1988). Additionally, the United States Supreme Court has held that the excessive fines clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, ___ U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989). *See also Ingraham v. Wright*, 30 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (establishing the constitutional boundaries of the Eighth Amendment). We continue to adhere to our view that punitive damages awards under our wrongful death statutes do not violate the Eighth Amendment.

III. Due Process

Alabama Power argues that Alabama's wrongful death statute denies it its due process rights under the Fourteenth Amendment and Article I, §§ 6 and 13, of the Alabama Constitution because the statute allows only punitive damages, and not compensatory damages, upon a finding of negligence by a preponderance of the evidence, and, further, allows a jury to assess the amount of damages at its discretion. We recently reviewed and rejected this argument in *Central Alabama Elec. Co-Op. v. Tapley, supra*. Because these issues are argued generally and collectively in the briefs and because they mirror in many instances the same arguments presented in *Tapley, supra*, we quote rather extensively from that opinion:

> "Does the due process clause of the Fourteenth Amendment require that juries be guided by objective criteria in order to properly assess punitive damages? Stated perhaps more accurately, is it fundamentally unfair for a jury to award punitive damages without the guidance of objective criteria?
>
> "We recognize, indeed, we are faced almost daily with, the comments of various jurists, philosophers, scholars, and members of the national bar assailing the practicality in civil cases of the jury system and lamenting its continued existence. The three bases of criticism most often voiced are the helplessness and lack of sophistication of jurors obligated to resolve issues in complex litigation; the tendency of modern juries to overcompensate injured tort victims for noneconomic damages; and the 'unbridled' discretion jurors enjoy in imposing massive punitive damages awards. On the larger scale, those complaints, and the very issue under review here, are really attacks on the civil justice system as a whole.

"Just because 'juries have always done it that way' is no adequate response. But we must pause to recall that, until *very* recently, attacks on jury verdicts have not been rooted in the federal constitution. History instructs us that, in the typical case involving noneconomic damages and punitive damages, once the jury has been instructed on and determines liability, the amount of compensation to be awarded and the extent of punishment to be meted out are subjects unquestionably within the sacred domain of the jury's discretion. A large jury verdict was subject to judicial revision only if the form of the verdict was incorrectably flawed or if the verdict was undeniably the product of some improper motive, such as bias or prejudice, or bent with an improper emotion, such as passion.

"Tossed into the lessons of the past is the fact that the only damages available in a wrongful death action brought pursuant to Alabama law are punitive damages. The sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life, have all been accepted by our Legislature as criteria outweighing the seeming anomaly of permitting punitive damages for simple negligence. This view rests on the premise that one may be adequately compensated for his injuries, but the value of human life has no measure. Punishing the tort-feasor dissuades others from engaging in life-endangering conduct.

"To paraphrase a famous (or infamous) quotation, the American system of civil justice is the worst in the world—except for all of the rest. As the 'problems' with the jury system have been

pointed out with increasing frequency, so has the justice system responded.

"If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur, and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur.

"If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it. And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors:

> " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.'
>
> " '(2) The degree of reprehensiblity of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to

cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.'

" '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.'

" '(4) The financial position of the defendant would be relevant.'

" '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.'

" '(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.'

" '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.'

"*Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-24 (Ala. 1989) (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

"Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence. But the *degree* of punishment necessary to achieve those goals changes with each case. In the rarest cases, involving the most egregious conduct, juries should be entitled to punish defendants so severely as to destroy

them; justice demands that. But in the typical punitive damages case, the award should punish without destroying. That, in a nutshell, is the way punitive damages and the civil justice system coexist.

"The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit. We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case. Discretion tolerates elasticity, but the jury's discretion is by no means unbridled. The 'whims' of any given jury are still harnessed by the authority of the trial court and appellate courts.

"Due to the safeguards now in place in Alabama, we find no merit to [the defendant's] allegation that its rights to substantive due process have been denied, or based on the issues preserved for our review, that our wrongful death statute is unconstitutional. We have confidence in our system of civil justice and faith that that system will accommodate change as it is required.

"We close our discussion with the wisdom of Mr. Justice Cardozo:

> " 'The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value of greater than its component elements. The same thing is true of the work of juries. I do not mean to suggest that the product in either case does not betray

> the flaws inherent in its origin. The flaws are there as in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not expect more of it when embodied in the judgments of the courts. The tide rises and falls, but the sands of error crumble.' [Quoting Cardozo, *The Nature of the Judicial Process* 143 (1921).]"

546 So. 2d at 376-78 (footnotes omitted).

IV. Equal Protection

Additionally, Alabama Power contends that the exception of wrongful death actions from Ala. Code 1975, §§ 6-5-410 and -411, violates its equal protection rights under the Fourteenth Amendment. These statutes restrict punitive damages in tort actions other than for wrongful death to acts of oppression, fraud, wantonness, or malice, proved by clear and convincing evidence, and they place a ceiling of $250,000 on such awards. Alabama Power argues that this attempted classification is not a rational method of furthering a legitimate State purpose and, further, that the distinction between punitive damages awards in wrongful death actions and such awards in all other tort actions bears no relation to the statutory purpose.

The equal protection guarantee requires that a legislative classification is properly drawn. Our review of this issue is limited to whether it is conceivable that the classification bears a rational relationship to an end of government that is not prohibited by the Constitution of the United States. Nowak, Rotunda, and Young, *Constitutional Law* § 14.3, at 580 (3d ed. 1986).

The exception of wrongful death actions from legislation restricting punitive damages is warranted, because wrong-

ful death actions differ critically from the actions to which the restrictions apply. In Alabama, only punitive damages are available in wrongful death actions, and these damages may be awarded against a defendant based on its negligent conduct. The United States Supreme Court approved Alabama's policy of awarding punitive damages in wrongful death actions in *Louis Pizitz Dry Goods Co. v. Valdell*, 274 U.S. 112, 47 S.Ct. 509, 71 L.Ed. 952 (1927). The Court recognized that "the purpose of Alabama's wrongful death act [Homicide Act of Alabama, § 5696, Code of 1923] is to strike at the evil of the negligent destruction of human life" and concluded: "We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive." 274 U.S. at 116, 47 S.Ct. at 510.

The protection of the lives of its citizens is certainly a legitimate state interest. By allowing punitive damages to be assessed against defendants in wrongful death actions in a manner different from the way punitive damages are assessed in other civil actions, the legislature has undoubtably recognized that no arbitrary cap can be placed on the value of human life and is "attempt[ing] to preserve human life by making homicide expensive." 274 U.S. at 116, 47 S.Ct. at 510. The exception of wrongful death actions from legislation imposing caps on the amount of punitive damages that can be awarded in civil actions bears a rational relationship to a legitimate state interest that is not prohibited by the Constitution. Therefore, that exception does not violate the guarantee of equal protection.

V. Juror Testimony

Alabama Power asserts that, if this Court denies its request for a new trial on the above grounds, then this case should be remanded to allow it the opportunity to develop evidence regarding alleged extraneous facts considered by the jury during its deliberations. Specifically, Alabama Power contends that it was wrongfully denied

the opportunity to question a juror during post-trial proceedings regarding either comments she allegedly made about Alabama Power's liability insurance or any individual ill will on her part toward Alabama Power. Alabama Power also contends that the trial court erred in striking the affidavit of a fellow juror that set forth the substance of those alleged comments.

As a general rule, neither testimony nor affidavits are admissible to impeach a jury's verdict. *Fabianke v. Weaver*, 527 So. 2d 1253 (Ala. 1988); *Wibery v. Sadoughian*, 514 So. 2d 940 (Ala. 1987). An exception to this rule exists when an affidavit tends to show extraneous facts that have influenced the jury's deliberations and the resulting verdict. *Fabianke, supra*. Affidavits, such as the one at issue here, concerning "the debates and discussions of the case by the jury while deliberating thereon" do not fall within the exception to the rule. Rather, statements that have been held admissible under this exception usually are made to the jury by someone not on the jury. *Weekly v. Horn*, 263 Ala. 364, 82 So. 2d 341 (1955), cited in *Fabianke, supra*. Thus, the trial judge did not err in striking the affidavit of one juror and in refusing to allow another juror to be questioned during post-trial proceedings.

VI. Excessiveness of the verdict

Alabama Power contends that the $5,000,000 award in this case is so excessive that a new trial is warranted or a remittitur is mandatory. Alabama Power further contends that the jury verdict is not supported by the facts and that there is evidence to support its proposition that the award was based on bias, passion, prejudice, or other improper motive.

The record reflects that, consistent with *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the trial court held a hearing and stated, on the record, its reasons for denying Alabama Power's motion for a new trial based

upon the alleged excessiveness of the jury's verdict. The following excerpt from that order reveals that the trial judge reviewed the evidence in a manner consistent with the factors outlined in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989):

> "Defendant also contends that the jury's verdict of five million dollars was excessive and that this Court should conditionally grant a new trial upon the Plaintiff's failure to accept a remittitur. This Court will examine that aspect of the motion and the jury's verdict in light of the decision in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). In that regard, the Court has held a hearing and considered additional evidence submitted by the parties as well as the evidence which was submitted to the jury during the trial of this case. The Court will discuss that evidence in light of the factors outlined in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).
>
> "Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct. In this case, the Plaintiff's son was killed. There is no greater harm which can occur. The purpose of the Alabama Wrongful Death Act under which this claim was brought is to preserve human life. Consideration of this factor weighs heavily in favor of the conclusion that the jury's verdict was not excessive.
>
> "The Defendant's conduct should be considered. In this case it was undisputed that immediately prior to the Plaintiff's son striking the guy wire with his truck door the clearance between that guy wire and the closest energerized wire was substantially less than that required by Alabama Power Company's own standards and

every other recognized standard for electrical transmission wires. Defendant admitted that this condition was extremely dangerous and likely to cause death.

"The evidence was in dispute as to what caused the dangerous condition to occur. If the Plaintiff's evidence is believed the dangerous condition existed for some fifteen months prior to the incident. During that time Alabama Power Company performed repairs and service in a number of locations near this pole. In addition, each month an Alabama Power Company employee walked this area to read meters.

"The Alabama Power Company engineer who designed these lines and equipment admitted that he 'eye-balled' the location rather than performing computations to determine whether there were adequate clearances. The construction work was inspected by several employees, including this engineer, after the work was completed but this dangerous condition was not noticed or if noticed was not corrected.

"This was a lengthy case and there is a great deal of additional evidence concerning the Defendant's conduct which will not be discussed here. This Court is firmly of the opinion that the evidence of Defendant's conduct in this case certainly does not weigh in favor of reducing this verdict.

"Any profit of the Defendant as [a] result of the wrongful conduct should be considered. The Defendant indicated in answer to post-judgment interrogatories that it does not know what it would cost to institute a periodic inspection program of its wires and equipment which could have identified this dangerous condition prior to the

incident. There was testimony that the Defendant has more than one million poles across the State and more than three hundred thousand guy wires. Clearly, such an inspection program would involve substantial expenditures. But not having such a program this Defendant has certainly profited although this Court is not in a position to quantify that profit.

"The financial position of the Defendant is relevant. Alabama Power Company has admitted that this verdict will have no adverse impact on it. Certainly, in that circumstance its financial condition cannot be used as a factor to reduce the verdict. It seems unlikely that the purpose of deterrence would be fulfilled if this verdict were reduced since even this verdict is insignificant to the profits and assets of this Defendant.

"The other factors discussed in *Green Oil* do not appear to this Court to have any application in this case. Defendant Alabama Power Company does not argue that those factors justify reduction of the verdict.

"Defendant does not argue that this jury verdict resulted from bias, passion, prejudice, corruption or other improper motive on behalf of the jury except to say that its size alone indicates that. This Court has considered the jury and its function in this case and specifically finds that this verdict was not the result of any bias, passion, prejudice, corruption or other improper motive. Considering the evidence presented, this verdict is not so large as to shock the judicial conscience of this Court.

"**FINDINGS OF FACT**

"1. The verdict in this case was not the result of bias, passion, prejudice, corruption or other improper motion.

"2. The amount of the verdict in this case was justified by the evidence presented.

"3. The amount of the verdict in this case does not exceed an amount that will accomplish society's goal of punishment and deterrence.

"4. The evidence in this case indicates conduct by the Defendant which justifies imposition of punitive damages in the amount of this jury verdict."

However, as we recognized in *Burlington Northern R.R. v. Whitt*, [Ms. 88-376, Sept. 21, 1990] ___ So. 2d ___, at ___ (Ala. 1990), the trial court's compliance with the *Hammond* guidelines does not relieve us of our responsibility to consider whether the award is excessive. Our review of the record in this case, together with our consideration of the damages awards in other wrongful death actions, leads us to the conclusion that the award of $5,000,000 in this case is excessive and should be reduced by $1,500,000. Therefore, we affirm the trial court's judgment, conditioned on the acceptance of a remittitur of $1,500,000 by the plaintiff, within 28 days of the date of the opinion, which will result in a judgment in his favor in the amount of $3,500,000.

Accordingly, the judgment is affirmed, conditioned upon the plaintiff's acceptance of the remittitur of $1,500,000 as ordered by this Court.

AFFIRMED CONDITIONALLY.

Maddox,* Jones, Shores, and Steagall, JJ., concur.

Houston, J., dissents.

HOUSTON, JUSTICE (dissenting).

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* Although Justice Maddox did not sit at oral argument, he has studied the record and listened to the tapes of oral argument.

The Constitution of Alabama 1901, Art. I, § 1, provides as follows:

> "That the great, general, and essential principles of liberty and free government may be recognized and established, *we declare*:
>
> "*That all men* are equally free and independent; that they *are endowed* by their Creator *with certain inalienable rights; that among these are life*, liberty and the pursuit of happiness."

(Emphasis supplied.) This declaration of the right to life appeared in the Alabama Constitution of 1875 (Art. I, § 1).[1] "[A]ll men . . . are endowed . . . with [the right to] life"—the right to life that is "inalienable" ("that may not be taken away," *Webster's New World Dictionary* 708 (2d college ed. 1986), or that "[is] not capable of being surrendered or transferred without the consent of the one possessing such [right]" *Black's Law Dictionary* 759 (6th ed. 1990)).

The Alabama Constitution has declared that the citizens of Alabama have a right to life. Art. I, § 13, of the Alabama Constitution, provides "that every person, for any injury done him, in his . . . person . . . , shall have a remedy by due process of law." Therefore, with the Constitution declaring that there is both a right to life and a right to a remedy for a violation of that right, it is my opinion that neither the legislature nor the judiciary can take away from the citizens of Alabama the right to be compensated for the deprivation of the right to life if that deprivation is caused by the wrong of another. The compensation must be paid to the estate of the decedent, which is a legal extention of the decedent beyond death.

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[1] The preambles to the Alabama Constitutions of 1819 and 1865, but not the Constitution of 1861, referred to the right "of" life, but did not in the "Declaration of Rights" declare that there was a right to life.

I have struggled with this Court's interpretation of the Alabama Wrongful Death Act (Ala. Code 1975, § 6-5-410). See my opinion in *Tatum v. Schering Corp.*, 523 So.2d 1042, 1047-63 (Ala. 1988), which I wrote as an opinion for the Court, but converted into a dissent when I could not obtain the necessary votes for that opinion to carry. Even when researching in preparation for writing *Tatum*, I was blinded to the fundamental law of the Constitution by the paradigm of the words of § 6-5-410, as interpreted in *South & North Alabama R.R. v. Sullivan, Adm'r*, 59 Ala. 272, 279-80 (1877) ("[what is now § 6-5-410] creates the right—a right unknown to the common law—and provides a remedy," and "[n]o other remedy can be pursued"), which was predicated upon Lord Ellenborough's dictum in *Baker v. Bolton*, 1 Campbell 493, 170 Eng. Reprint 1033 (1803) ("[i]n a civil Court, the death of a human being could not be complained of as an injury"). Regardless of our feeble attempt to interpret § 6-5-410 in the light of imagined common law rights and remedies, there is a constitutional right to life; there is a constitutional right to a remedy for a wrongful deprivation of the right to life. The common law is the law of this State *only* "as it is not inconsistent with the Constitution, laws and institutions of this State." Ala. Code 1975, § 1-3-1. In my opinion, in Alabama it is unconstitutional for the legislature or the judiciary (and I believe that the fault lies exclusively with the judiciary, *Tatum*, 523 So.2d 1050-52, 1059-61) to deny the right to compensation for the wrongful death of a person. Constitution, Art. I, §§ 1 and 13.

I am a strong believer that if a person's right is diminished or destroyed as a result of the wrongful act, omission, or negligence of another, the person or the person's estate is entitled to full *compensation* for *all damages* proximately caused by such wrongful act, omission, or negligence. *Tatum*, 523 So.2d at 1048. The right of the injured party *to full compensation* must be paramount. Forty-nine other states allow compensation for wrongful death. There are adequate means for a jury or a court to determine

the full compensation for death. See, S. Speiser, *Recovery for Wrongful Death* (2d ed. 1975), (ch. 3, "Damages").

The Fourteenth Amendment constitutional challenge to the judicial interpretation of the Alabama Wrongful Death Act was preserved in this case. Therefore, we are confronted with the question whether, in wrongful death actions in Alabama, the standard of proof and the jury instruction relating to that standard of proof are consistent with the procedural due process guaranteed by the Fourteenth Amendment. I think that they are not.

Given the present inclination of the Supreme Court of the United States to address the subject of punitive damages, should the Supreme Court of Alabama do nothing now and be told what to do later? I think not. There is an old Barbour County adage: "I'd as soon be hanged for a goat as a sheep."[2]

I previously expressed my concern about the constitutionality of the judicial interpretation of our wrongful death act when this Court was not directly confronted with a substantial wrongful death award. See *Tatum v. Schering Corp.*, 523 So.2d 1042, 1062-63 (Ala. 1988) (Houston, J., dissenting).

A commentator has correctly described the interpretation given our wrongful death act by a majority of this Court:

> "In Alabama an action for wrongful death, if successful, results in an award of punitive damages only. For this reason, the plaintiff may not argue, nor may the jury consider, evidence tending to show that the decedent had an expected lifetime income of any particular amount; that

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[2] In spite of this, or perhaps because of this, Barbour County, with a population of approximately 25,000 people, has produced more governors than any other county in the State of Alabama.

> the decedent was exceptionally healthy or sickly; that the death caused someone to incur the expenses of an autopsy, a funeral, and a burial; that lost spousal, parental, or filial consortium had any value; or any other aspect of the decedent's life to which a value might be attached. Rather, the award serves only to further the avowed purposes of punitive damages generally—punishing the defendant, affording a measure of retribution, and deterring others from engaging in conduct similar to that which brought about the decedent's demise. In that sense, the plaintiff acts as the agent of the State, a private district attorney, to vindicate an interest of society and to seek retribution for a harm done to the people. Further, the plaintiff cannot seek, in any measure, compensation for the family or the estate of the decedent. Thus, any award received by the estate is fortuitously compensatory, not intended or designed to be that way. Because only society's interests are sought to be vindicated in wrongful death actions, and because the victim's estate has no *right* to be compensated for its loss, the assumption that society reaps the benefit of the jury's award is theoretically sound."

L. King, *On Civil Punishment and Tort Reform in Alabama*, 20 Cumb. L. Rev. 47, 49-51 (1989) (emphasis original).

The United States Supreme Court requires that the standard of proof in a civil action, and the jury instructions relating to that standard, must be consistent with the procedural due process guaranty of the Fourteenth Amendment. *Santosky v. Kramer*, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). The United States Supreme Court measures the adequacy of a given civil procedural rule by balancing three factors: (1) how the existing procedures affect the private interests involved; (2) how likely it is

that the existing procedures will result in erroneous decisions; and (3) how great the government's interests in the existing procedure are and the burden of administering an alternative procedure. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 47 L.Ed.2d 18 (1976).

I believe that punitive damages are not to compensate a victim for loss but to punish and deter. In considering punitive damages, there is no "amount" to which an uncompensated victim is entitled; and, therefore, there is no need for giving anyone maximum assurance that a certain amount will be recovered. When considering punitive damages, the defendant's right to fair punishment must be paramount. *Wilson v. Dukona Corp.*, 547 So.2d 70 (Ala. 1989).

Using the *Mathews v. Eldridge* factors, I must conclude that the interpretation given § 6-5-410 by the majority of this Court does not afford a defendant procedural due process, for the following reasons:

(1) If society is the true party plaintiff in wrongful death actions, there is no private interest involved with respect to the plaintiff—only a public interest. See, *Maryland Casualty Co. v. Tiffin*, 537 So.2d 469, 471 (Ala. 1988).

> " '[T]he plaintiff is without legal right to [punitive damages], as that right attaches to actual damages suffered. *Comer v. Age-Herald Pub. Co.*, 151 Ala. 613, 44 So. 673, 13 L.R.A. (N.S.) 525. *Such damages* [punitive] *may be even forbidden, or affirmatively withheld*, by legislative enactment, *so far as impinging rights of property are concerned.*' "

Dowling, Adm'r v. Garner, 195 Ala. 493, 496, 70 So. 150, 151-52 (1915), quoting *Louisville & N.R.R. v. Street*, 164 Ala. 155, 51 So. 306, 20 Am. Cas. 877 (1909). (Emphasis added.) See *Maryland Casualty Co. v. Tiffin*, 537 So.2d at 471. The only private interest, therefore, is that of the

defendant. Two of the defendant's property interests—financial and reputational—are at stake. If found guilty, the defendant pays a judgment, not to compensate a victim, but to punish the defendant and to deter the defendant and others from committing the negligent or wanton act or omitting the act.

In *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 837 (Ala. 1988), the majority of this Court held:

> "Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that is has engaged in *conduct considered intolerable by society*. . . ." (Emphasis added.)

Because the defendant has so much at stake and because, *as the majority of this Court has interpreted the wrongful death statute* the plaintiff has nothing at stake (even though I think that the plaintiff has a constitutional right to recover compensatory damages), the first factor of the due process analysis weighs totally in favor of the defendant.

(2) How likely is it that the existing procedures will result in erroneous decisions?

Punishment is based upon a mere preponderance of the evidence. "Preponderance of evidence" as a standard of proof in a civil case means "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Black's Law Dictionary* 1182 (6th ed. 1990). It has been argued that this low standard of proof encourages punishment for what is often minimal culpability without impressing on the minds of the jurors the gravity of their verdict. Nettles and Lette, *Alabama's Wrongful Death*

Statute: A Problematic Existence, 40 Ala.L.Rev. 475, n. 12, at 497-507 (1989).

From examining those cases in which closing arguments are included in the record, my observation from the bench has been that the most substantial verdicts in wrongful death cases are recovered in cases in which the plaintiffs' attorneys, during the closing argument, stress variations on the themes of "responsibility" and "opportunity." In effect, the jurors are told that they are responsible for eradicating negligent, or wanton, or willful homicide and that they more than anyone else have the opportunity to do so by pinching the defendant's pocketbook nerve with sufficient force. The wrong stressed in such arguments is the death rather than the culpability of the defendant or defendants in causing the death.

The jury is then instructed by the trial court that the amount of damages should be directly related to the amount of wrongdoing on the part of the defendant, *Alabama Pattern Jury Instructions—Civil*, 11.18, p. 161. However, if the wrongful act or omission of more than one defendant combined to proximately cause the death, the jury is instructed that it cannot apportion the damages according to the wrong of each defendant. *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1267 (Ala. 1986); *Tatum v. Schering Corp.*, 523 So.2d at 1048-49.

It has been extremely difficult for me as an appellate judge to apply the factors set out in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), in wrongful death cases. See *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989) (Houston, J., concurring specially, pp. 88-90). And it appears that in wrongful death cases we, as an appellate court, have recently abandoned the *Green Oil* factors and with Delphian efficacy have excised sizable portions of wrongful death jury verdicts, even though the act that we have held created the right of action for wrongful death allowed "such damages as the jury may assess." *Burling-*

ton Northern R.R. v. Whitt, [Ms. 88-376, September 21, 1990] ___ So.2d ___ (Ala. 1990). This is a power reserved only by a court of last resort.

Be that as it may, at best this factor in the due process analysis is evenly weighed between the plaintiff and the defendant.

(3) How great is the State's interest in the existing procedures and what is the burden of administering alternative procedures?

> "The State is *parens patriae* to all its citizens, a benevolent supervisor of all society. Paramount in the State's interests must be that its citizens are treated fairly by the laws to which they are subject. This concern is perhaps especially compelling when the State is using the law to vindicate the greater interests of society at the expense of a single member, such as in the prosecution of a crime or, in the pertinent context, the prosecution of a civil wrongful death action. The touchstone of any law must be fairness, and fairness obviously embraces just results in prosecutions by the State. As for the burden of alternative procedures on the State, a change in existing procedures would cost little more than the fees associated with printing supplements to various legal texts and form books. Such cost is minuscule in comparison to the potential benefits of the charge."

L. King, *On Civil Punishment*, 20 Cumb.L.Rev. at 53-54.

I agree with Mr. King. This final consideration in the due process analysis weighs in favor of the defendant. In my opinion, this Court erred in determining what damages were recoverable under what is now § 6-5-410 in *Savannah & Memphis R.R. v. Shamrer*, 58 Ala. 672 (1877), and in *South & North Alabama R.R. v. Sullivan, Adm'r*, 59 Ala. 272 (1877). This has caused us to deny recovery for death

in some cases in which one could have recovered if the wrongful act that caused death had, instead, caused only a personal injury. See *Carter v. City of Birmingham*, 444 So.2d 373 (Ala. 1983), cert. denied, 467 U.S. 1211, 104 S.Ct. 2401, 81 L.Ed.2d 357 (1984); *Slagle v. Parker*, 370 So.2d 947 (Ala. 1979). *Stare decisis*, in wrongful death cases, is deadlocked as in no other area of the law in Alabama by our insistence in allowing only punitive damages for wrongful death. We have failed to recognize the constitutional right to a remedy for a deprivation of the constitutional right to life.

The State must be interested in enforcing its constitutional provisions. Sections 1 and 13 of the Constitution assure citizens of this State a right to be compensated for a wrongful deprivation of the right to live. The State must make certain that this right is not abridged by the judiciary or any other branch of government. Therefore, the State's interest is great in assuring that the erroneous judicial interpretation of what damages can be recovered in an action for wrongful death is corrected, and the State has a responsibility, rather than a burden, to assure that these constitutional provisions are enforced. These constitutional provisions are not being enforced by the way the majority of this Court has interpreted what damages can be recovered for wrongful death.

Therefore, under the prevailing analytical framework for procedural due process, the judicial interpretation of § 6-5-410, insofar as it permits only punitive damages upon proof by a preponderance of the evidence, fails to provide procedural due process.

In this case, although the jury found that Alabama Power Company was negligent, it specifically found that Alabama Power Company was not wanton; therefore, I would reverse and remand for a jury to determine only

the full compensatory value of Mr. Turner's life. See S. Speiser, *Recovery for Wrongful Death* (2d ed. 1975) (ch. 3, "Damages").

APPENDIX B

IN THE CIRCUIT COURT
FOR MONTGOMERY COUNTY, ALABAMA

CV-88-1700-PR

GERALD L. TURNER, As Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Plaintiff,

v.

ALABAMA POWER COMPANY,

Defendant.

ORDER

This case is currently submitted to the Court on the Post-Judgment Motions of Defendant Alabama Power Company.

The Court having considered the Motion for Judgment Notwithstanding the Verdict filed by Defendant Alabama Power Company and argument of counsel, it is

ORDERED that the said Motion be, and the same is hereby DENIED.

Defendant has, in the alternative, moved the Court for a new trial based on a number of grounds. This Court is of the opinion that those grounds have no merit. However, the Court does desire to comment on one ground raised by the Defendant.

The Defendant argues that it is entitled to a new trial as a result of juror misconduct and submits the affidavit of one of the jurors to support that argument. Defendant also requested that the Court allow it to subpoena a num-

ber of jurors and question them concerning their deliberations in this case.

The Supreme Court of Alabama has held on numerous occasions that the affidavits of jurors cannot be accepted for the purpose of impeaching their verdict. *Weekley v. Horn*, 82 So.2d 341 (Ala. 1955). The basis for this rule was plainly stated in *Gulf State Steel Co. v. Law*, 224 Ala. 667, 141 So. 645:

> A due regard for the proper and orderly administration of the law, the proper regard for the solemnity of verdicts of jurors, as well as a sound public policy forbid that members of a jury, after they have made their deliverances in court, should be allowed to impeach their verdicts. To give consideration to such affidavits would tend to bring the law and its administration into disrepute.

This Court had the opportunity to observe the jurors during the course of this trial. They were clearly very serious about their duties and responsibilities. After the verdict was returned the jury was polled and each juror indicated his or her agreement with the verdict.

This Court received calls from several jurors complaining about being contacted by representatives of the Defendant and questioned about their verdict. Jurors stated they were threatened with being subpoenaed to testify if they refuse to sign affidavits. After these calls, the Court instructed the parties to have no further contact with jurors.

Jurors are paid very little and are asked to decide questions important to litigants. Allowing litigants dissatisfied with a jury's decision to burden those jurors with an inquiry into the deliberations would set a very dangerous precedent in the opinion of this Court.

The affidavit which was filed does not indicate the jury considered any extraneous facts which improperly influ-

enced the verdict. The Court will not consider that affidavit. Plaintiff's Motion to Strike is therefore GRANTED.

Defendant also contends that the jury's verdict of five million dollars was excessive and that this Court should conditionally grant a new trial upon the Plaintiff's failure to accept a remittitur. This Court will examine that aspect of the motion and the jury's verdict in light of the decision in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986). In that regard, the Court has held a hearing and considered additional evidence submitted by the parties as well as the evidence which was submitted to the jury during the trial of this case. The Court will discuss that evidence in light of the factors outlined in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the Defendant's conduct. In this case, the Plaintiff's son was killed. There is no greater harm which can occur. The purpose of the Alabama Wrongful Death Act under which this claim was brought is to preserve human life. Consideration of this factor weighs heavily in favor of the conclusion that the jury's verdict was not excessive.

The Defendant's conduct should be considered. In this case it was undisputed that immediately prior to the Plaintiff's son striking the guy wire with his truck door the clearance between that guy wire and the closest energized wire was substantially less than that required by Alabama Power Company's own standards and every other recognized standard for electrical transmission wires. Defendant admitted that this condition was extremely dangerous and likely to cause death.

The evidence was in dispute as to what caused the dangerous condition to occur. If the Plaintiff's evidence is believed the dangerous condition existed for some fifteen months prior to the incident. During that time Alabama Power Company performed repairs and service in a num-

ber of locations near this pole. In addition, each month an Alabama Power Company employee walked this area to read meters.

The Alabama Power Company engineer who designed these lines and equipment admitted that he "eye-balled" the location rather than performing computations to determine whether there were adequate clearances. The construction work was inspected by several employees, including this engineer, after the work was completed but this dangerous condition was not noticed or if noticed was not corrected.

This was a lengthy case and there is a great deal additional evidence concerning the Defendant's conduct which will not be discussed here. This Court is firmly of the opinion that the evidence of Defendant's conduct in this case certainly does not weigh in favor of reducing this verdict.

Any profit to the Defendant as result of the wrongful conduct should be considered. The Defendant indicated in answer to post-judgment interrogatories that it does not know what it would cost to institute a periodic inspection program of its wires and equipment which could have identified this dangerous condition prior to the incident. There was testimony that the Defendant has more than one million poles across the State and more than three hundred thousand guy wires. Clearly, such an inspection program would involve substantial expenditures. By not having such a program this Defendant has certainly profited although this Court is not in a position to quantify that profit.

The financial position of the Defendant is relevant. Alabama Power Company has admitted that this verdict will have no adverse impact on it. Certainly, in that circumstance its financial condition cannot be used as a factor to reduce the verdict. It seems unlikely that the purpose of deterrence would be fulfilled if this verdict were reduced

since even this verdict is insignificant to the profits and assets of this Defendant.

The other factors discussed in *Green Oil* do not appear to this Court to have any application in this case. Defendant Alabama Power Company does not argue that those factors justify reduction of the verdict.

Defendant does not argue that this jury verdict resulted from bias, passion, prejudice, corruption or other improper motive on behalf of the jury except to say that its size alone indicates that. This Court has considered the jury and its function in this case and specifically finds that this verdict was not the result of any bias, passion, prejudice, corruption or other improper motive. Considering the evidence presented, this verdict is not so large as to shock the judicial conscience of this Court.

FINDINGS OF FACT

1. The verdict in this case was not the result of bias, passion, prejudice, corruption or other improper motive.

2. The amount of the verdict in this case was justified by the evidence presented.

3. The amount of the verdict in this case does not exceed an amount that will accomplish society's goal of punishment and deterrence.

4. The evidence in this case indicates conduct by the Defendant which justifies imposition of punitive damages in the amount of this jury verdict.

It is therefore ORDERED that the Defendant's Motion for New Trial be, and the same is hereby, DENIED.

DONE this 15th day of November, 1989.

/s/
CIRCUIT JUDGE

Jere L. Beasley
Frank M. Wilson
Sterling G. Culpepper, Jr.

APPENDIX C

State of Alabama
Unified Judicial System

IN THE CIRCUIT COURT
OF MONTGOMERY COUNTY

CASE NUMBER

CV-88-1700-PR

GERALD L. TURNER

Plaintiff/State

v.

ALABAMA POWER COMPANY

Defendant(s)

JURY VERDICT

1. We, the jury, find for the Plaintiff based upon (check one):
   Negligence ✓
   Wantonness ____
   And assess the punitive damages at $5,000,000.00
   Five Million dollars
2. We, the jury, find for the Defendant. ____

Edward H. Minter III
Print Foreman's Name

Date filed 8-30-89

/s/ Edward H. Minter III
Foreman's Signature

BY: _____
Clerk of Circuit Court

APPENDIX D

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-88-1700-PR

GERALD L. TURNER, As Administrator of the Estate of Kenneth Allen Turner, Deceased,

Plaintiff,

vs.

ALABAMA POWER COMPANY, *et al.*,

Defendants.

ANSWER

COMES the Defendant Alabama Power Company and for answer to the complaint heretofore filed herein says as follows:

FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

1. Defendant Alabama Power Company admits the allegations contained in paragraphs 2, 12, 13, and 16 of the complaint and that portion of paragraph 19 which alleges that Kenneth Turner was electrocuted and died. Defendant also admits the allegations in paragraphs 15 and 16, but avers that the lines were distribution lines rather than transmission lines, and avers that the supporting wires were guy wires rather than guide lines.

2. This Defendant does not have sufficient knowledge to admit or deny the allegation contained in paragraph 1 of the complaint.

3. No answer is required of this Defendant as to paragraphs 3 through 11 of the complaint regarding fictitious parties.

4. This Defendant denies the remaining allegations of the complaint.

THIRD DEFENSE

The Alabama Wrongful Death Statute, § 6-5-410 and 411, *Code of Alabama*, 1975, is unconstitutional in that it permits punitive damages to be awarded for simple negligence alone.

FOURTH DEFENSE

The Alabama Wrongful Death Statute, §§ 6-5-410 and 411, *Code of Alabama*, 1975, as construed and applied, permits only punitive damages, and to permit a punitive damage award under the facts and circumstances of this case, and based on the allegations of the complaint, would deprive this Defendant of its property rights in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, and of the Alabama Constitution of 1901, due to the lack of sufficient standards governing such punitive damage awards. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ___, 89 U.S.L.W. 823; *Smith v. Wade*, 461 U.S. 30, 42-43; *Electrical Workers v. Faust*, 442 U.S. 42, 48; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-69, 69 L.Ed.2d 616.

FIFTH DEFENSE

The Alabama Wrongful Death Statute, §§ 6-5-410 and 411, *Code of Alabama*, 1975, as construed and applied, permits only punitive damages, and to permit a punitive

damage award under the facts and circumstances of this case, and based on the allegations of the complaint, would deprive this Defendant of its constitutional rights in violation of the Fourth, Fifth, Sixth and Eight Amendments, as incorporated in the Fourteenth Amendment of the Constitution of the United States. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. ___, 89 U.S.L.W. 823; *Smith v. Wade*, 461 U.S. 30, 42-43; *Electrical Workers v. Faust*, 442 U.S. 42, 48; *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-69, 69 L.Ed.2d 616.

SIXTH DEFENSE

The Alabama Wrongful Death Statute, §§ 6-5-410 and 411, *Code of Alabama*, 1975, as construed and applied, permits only punitive damages, and to permit a punitive damage award under the facts and circumstances of this case, and based on the allegations of the complaint would deprive this Defendant of its property rights in violation of the Due Process Clause of the Fourteenth Amendment, and is impermissible under the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States.

/s/ S. G. CULPEPPER
STERLING G. CULPEPPER, JR.

/s/ MAURY SMITH/SGC
MAURY D. SMITH

/s/ M. R. NACHMAN/SGC
M. ROLAND NACHMAN, JR.

OF COUNSEL:

BALCH & BINGHAM
P. O. Box 78
Montgomery, Alabama 36101
205/834-6500

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon Jere L. Beasley, Esquire, Beasley, Wilson, Allen & Mendelsohn, P. O. Box 4160, Montgomery, Alabama 36103-4160 by placing same in the United States mail, postage prepaid, this the 7 day of December, 1988.

/s/ S. G. CULPEPPER
OF COUNSEL

APPENDIX E

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-88-1700-PR

GERALD L. TURNER, Etc.

Plaintiff,

v.

ALABAMA POWER COMPANY, *et al*

Defendants.

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE, FOR A NEW TRIAL

COMES now the Defendant Alabama Power Company, Inc., (APCo) pursuant to Rule 50(b) ARCP and having previously moved for directed verdict under Rule 50(a) ARCP, moves this Honorable Court to grant a judgment notwithstanding the verdict in this cause; or in the alternative, pursuant to Rule 59 ARCP, to grant a new trial in this cause on one or more of the following grounds:

1. The Court erred in failing to direct a verdict for the Defendant.

2. The judgment in this case; the failure of the Court to direct a verdict for Defendant; and §6-5-410, *Code of Alabama*, 1975 (the wrongful-death statute), on its face and as applied in this case violate the guaranties of the Due Process Clause of the Fourteenth Amendment of the United States Constitution which checks and safeguards against undue jury discretion to award punitive damages.

Browning-Ferris v. Kelco Disposal, 492 U.S. ___, 106 L.Ed. 2d 219, 239.

3. There is insufficient evidence to support the verdict for the Plaintiff in this action.

4. The Court erred in denying Defendant's motions for a mistrial based upon counsel for Plaintiff's repeated attempts to elicit evidence about whether the Defendant, since the date of decedent's death, has commenced a program of periodic inspection of its overhead lines.

5. The Court erred in permitting the jury to award punitive damages for simple negligence only.

6. The Court erred in refusing Defendant's written requested charges number 13, 14 and 15, instructing the jury that it may not award punitive damages based upon simple negligence only.

7. The Court erred in refusing Defendant's written requested charges number 13 and 14, directing the jury that it may not award punitive damages except upon a finding of wantonness established by clear and convincing evidence.

8. The Court erred in refusing Defendant's written requested charges number 6, 7, 8 and 9 regarding contributory negligence and in failing to adequately instruct the jury on contributory negligence. The Court further erred in failing to give Defendant's written requested charge number 5.

9. The Court erred in permitting the jury to return a verdict of punitive damages, based upon simple negligence only, upon a finding of a preponderance of the evidence only.

10. The Court erred in refusing to permit Defendant's expert, Ken Menk, to remain in the courtroom during the testimony of Plaintiff's expert, Owen Posey.

11. The verdict for the Plaintiff is unsupported by evidence of any probative value or substance.

12. The Plaintiff's intestate was guilty of contributory negligence as a matter of law. Since the jury verdict against the Defendant was predicated upon simple negligence only, Defendant is entitled to judgment as a matter of law.

13. The Court erred in permitting counsel for Plaintiff to call an APCo employee, Ken Strong, as an adverse party or managing agent of an adverse party and in permitting counsel for Plaintiff to ask leading questions of the said witness.

14. The Court erred in permitting counsel for Plaintiff to elicit or attempt to elicit testimony tending to show that Alabama Power Company has not, since September 16, 1988, established a program of periodic inspection of its overhead lines. The foregoing violates the laws of this state prohibiting or limiting the admissibility of evidence regarding subsequent remedial measures undertaken by the Defendant.

15. Section 6-5-410, *Code of Alabama*, 1975 (the Alabama Wrongful Death Statute) is unconstitutional on the following grounds:

a. Said statute permits an award of punitive damages based upon a finding of simple negligence only, without guidelines or standards to guide the jury in assessing the amount of said damages. The statute is therefore violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America and the Alabama Constitution of 1901.

b. An award of punitive damages for simple negligence only is violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States of America.

c. The award of $5,000,000.00 in this case was violative of the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States of America and is an unconstitutional deprivation of property of Defendant without due process of law in violation of the Fourteenth Amendment of the United States Constitution.

d. The Alabama Wrongful Death statute, which permits a jury to award punitive damages for simple negligence only, without limitation as to amount, is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America in that, among other things, §6-11-20 through §6-11-30, *Code of Alabama* 1975, as amended, place a cap upon punitive damages in the amount of $250,000.00 while excluding, without constitutional justification or reason, actions for wrongful death brought pursuant to §6-5-410.

e. An award of punitive damages for simple negligence only based upon a preponderance of the evidence only, violates the rights and guaranties of this Defendant under the Due Process and Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America in that §6-11-20 through §6-11-30, *Code of Alabama* 1975, as amended, forbid the imposition of punitive damages except upon a finding of clear and convincing evidence, yet exclude without constitutional justification or reason actions for wrongful death brought pursuant to §6-5-410.

f. The Alabama Wrongful Death Statute, §6-5-410, *Code of Alabama*, 1975, as amended, as construed and applied, provides that the only damages recoverable thereunder are punitive damages. To allow recovery of punitive damages for simple negligence only deprives this Defendant of its property rights in violation of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States of America and of the Alabama Constitution of 1901.

g. The Alabama Wrongful Death Statute as construed and applied, provides that the only damages recoverable thereunder are punitive damages. To allow recovery of punitive damages for simple negligence alone deprives this Defendant of its constitutional rights in violation of the Fourth, Fifth, Sixth and Eighth Amendments as incorporated in the Fourteenth Amendment to the Constitution of the United States of America.

h. Defendant's punishment so greatly exceeds the alleged wrong that Defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama, 1901, and the Fourteenth Amendment of the Constitution of the United States has been denied.

16. The verdict of the jury was excessive for the following reasons:

a. The verdict was plainly and manifestly unjust and so gross, excessive and oppressive as to shock the conscience of the Court and was clearly the result of bias, passion, prejudice or other improper motives.

b. The verdict exceeded the amount sought by the Plaintiff.

c. The verdict was excessive in light of the fact that the jury found in favor of the Defendant on the wantonness allegation and restricted its finding against this Defendant to simple negligence only.

d. The verdict exceeds the cap of $250,000.00 imposed by §6-11-21, *Code of Alabama*, 1975, as amended.

e. The verdict was plainly the product of passion, prejudice, bias or other improper motives.

f. The verdict was obviously influenced by factors other than those presented to the jurors in the form of evidence and instructions from the Court during the course of the trial.

g. One of the jurors, an insurance agent, advised fellow jury members, during the course of jury deliberations, that Alabama Power Company had very high liability insurance limits; that in order to punish this Defendant it would be necessary to first exhaust those limits and cause the Defendant to expend its own funds and that a verdict of "double digit millions" would be required to accomplish that result.

h. Defendant's punishment so greatly exceeds the alleged wrong that Defendant's right not to be deprived of property without due process of law guaranteed by the Constitution of Alabama, 1901, and the Fourteenth Amendment of the Constitution of the United States has been denied.

17. The verdict was illegal and improper in that it was influenced by extraneous facts, described in ground 12(g) of this motion and as set forth in the affidavit of juror Jennifer Dunaway, attached hereto and incorporated herein by reference.

/s/ S. G. CULPEPPER
STERLING G. CULPEPPER, JR.

/s/ M. ROLAND NACHMAN, JR.
M. ROLAND NACHMAN, JR.

/s/ WM. P. COBB III/SGC
WILLIAM P. COBB, II

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Jere L. Beasley, Esquire and Frank M. Wilson, Esquire, Beasley, Wilson, Allen, Mendelsohn & Jemison, P.C., P. O. Box 4160, Montgomery, Alabama 36103-4160, by placing same in the United States mail, postage prepaid and properly addressed on this the 28 day of September, 1989.

/s/ S. G. CULPEPPER
OF COUNSEL

APPENDIX F

IN THE SUPREME COURT OF ALABAMA

CASE NO. 89-408

ALABAMA POWER COMPANY,

Appellant,

vs.

GERALD L. TURNER, *etc.*,

Appellee.

FILED
APR 25 1990
CLERK
SUPREME COURT OF ALABAMA

On Appeal from the Circuit Court of Montgomery County, Alabama

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REPLY BRIEF OF APPELLANT ALABAMA POWER COMPANY

Sterling G. Culpepper, Jr.
M. Roland Nachman, Jr.
David R. Boyd

Attorneys for Appellant

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ORAL ARGUMENT REQUESTED

ARGUMENT

I

The Jury Verdict Must Be Reversed Because the Wrongful Death Statute, As Construed and Applied, Violates the Constitution of the United States

Section I of APCo's brief (pp. 28-41) has developed fully the argument that this judgment on a jury verdict must be reversed because the Alabama wrongful death statute, as construed and applied in this case, violates the Constitution of the United States. It has been amply demonstrated that APCo has been deprived, by the judgment, verdict and proceedings below, of its property without due process of law; has been denied equal protection of the laws; and has been subjected to impermissible and excessive fines in violation of the Fourteenth and Eighth Amendments of the Constitution of the United States.[1]

While it is understandable that the plaintiff-appellee has a strong desire that this Court once again decline to confront the serious constitutional questions presented by APCo, it is disingenuous—to be charitable—for plaintiff-appellee to suggest that "Alabama Power's constitutional challenges are not

* * *

[1] In footnote 6 APCo has noted the recent holding of the Supreme Court of the United States in *Browning-Ferris* v. *Kelco Disposal*, 492 U.S. ___, 106 L.Ed.2d 219 (1989), that the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States does not apply in civil actions between private parties. Moreover, it is idle to debate with plaintiff-appellee whether the deprivation of due process should be classified as "substantive" or "procedural" due process. Either deprivation violates the constitutional protections.

CONCLUSION

For the foregoing reasons, and those addressed in APCo's principal brief, this Court should reverse the judgment entered below. Because of the constitutional infirmities in the relevant statutes, APCo is entitled to a judgment n.o.v. in its favor. If the Court is inclined to permit an opportunity to remedy these defects, the case should be remanded to await a new trial under a statutory scheme which will pass constitutional muster. Although the Court should reverse because of the constitutional infirmities discussed, the excessiveness of the jury award is an additional basis for a new trial.

REQUEST FOR ORAL ARGUMENT

Appellant Alabama Power Company respectfully requests oral argument.

Respectfully submitted,

/s/ S. G. Culpepper
Sterling G. Culpepper, Jr.

/s/ M. Roland Nachman, Jr.
M. Roland Nachman, Jr.

/s/ David R. Boyd/SGC
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APPENDIX G

Brewer v. *Watson*, 65 Ala. 88, 96 (1880) ("it is clear . . . that where [a public] officer acts in good faith, he is not liable to exemplary damages"; "there can clearly be no recovery of exemplary . . . damages, without proof of" acts committed "maliciously, and with intent to injure"); *Hays* v. *Anderson*, 57 Ala. 374, 378 (1876); *Roberts* v. *Heim*, 27 Ala. 678, 683 (1855) ("the law allows [punitive damages] whenever the trespass is committed in a rude, aggravating, or insulting manner, as malice may be inferred from these circumstances"); *Ward* v. *Blackwood*, 41 Ark. 295, 299-301 (1883) (punitive damages denied because "there was no evidence of previous malice, nor of deliberate cruelty, only of hot blood and a certain recklessness"; charge requiring "a wanton and willful manner, and under circumstance of outrage, cruelty and oppression, or with malice" approved); *Kelly* v. *McDonald*, 39 Ark. 387, 393 (1882) ("Exemplary damages ought not to be given, unless in cases of intentional violation of another's right, . . . or with a malicious intent to injure another in his person or property"); *Barlow* v. *Lowder*, 35 Ark. 492, 496 (1880) (instruction that "exemplary damages [are] allowed as a punishment for torts committed with fraud, actual malice, or deliberate violence or oppression" held a "textbook principle"); *Davis* v. *Hearst*, 160 Cal. 143, 163, 116 P. 530, 539-40 (1911) ("malice of evil motive" necessary to recover punitive damages in California); *Lyon* v. *Hancock*, 35 Cal. 372, 376 (1868); *Nightingale* v. *Scannell*, 18 Cal. 315, 325 (1861); *Dorsey* v. *Manlove*, 14 Cal. 553, 558 (1860) (holding that absence of "bad faith," "wanton or malicious motives," or "willfully unjust or oppressive" conduct barred punitive damages); *Wardrobe* v. *California Stage Co.*, 7 Cal. 118, 120 (1857) (injuries "sustained by reason of the negligence" do not give the jury power to "go beyond" compensation for "actual damages sustained" and award punitive damages); *Doroszka* v. *Lavine*, 111 Conn. 575, 150 A. 692 (1930) (reviewing cases limiting punitive damages

to amount of attorney's fees); *Dalton* v. *Beers*, 38 Conn. 529 (1871); *Welch* v. *Durand*, 36 Conn. 182 (1869) (special rule for ultrahazardous activities); *Dibble* v. *Morris*, 26 Conn. 416, 426-27 (1857) ("settled" that jury can award "vindictive [damages] in proportion to the degree of malice or wantonness evinced by the defendant"); *Huber* v. *Teuber*, 10 D.C. 484, 489-90 (1877) (punitive damages "are sometimes allowable . . . as punishment of a quasi-criminal character for the wantonness and malice which inspired the wrong of the defendant"; "malignant motives" and "improper motive" required); *Florida Railway & Navigation Co.* v. *Webster*, 25 Fla. 394, 420, 5 So. 714 (1889) ("only compensatory damages will be allowed, if there is no positive fault of the nature of recklessness" or where "so gross as to show willfulness, wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public"); *Coleman & Newsome* v. *Ryan*, 58 Ga. 132, 134 (1877) (instruction that jury might award "vindictive damages, if they believed that the conduct of [the defendant] was malicious, and for the purpose of breaking up plaintiff's business"); *Green* v. *Southern Express Co.*, 41 Ga. 515 (1871) (jury charge requiring a desire to injure the accused approved); *Yahoola River & C.C.H.H. Mining Co.* v. *Irby*, 40 Ga. 479, 482 (1869) ("bona fide belief" by defendant that he was acting lawfully bars punitive damages); *City of Chicago* v. *Martin*, 49 Ill. 241, 245 (1868) ("[T]o authorize the giving of exemplary or vindictive damages, either malice, violence, oppression or wanton recklessness must mingle in the controversy. The act complained of must partake of a criminal or wanton nature, else the amount sought to be recovered must be confined to compensation"); *Moore* v. *Crose*, 43 Ind. 30, 34-35 (1873) (punitive damage award reversed because "[t]here [were] no elements of malice, insult, or deliberate oppression in the case . . . [and] appellant was acting under the belief that he had a valid right"); *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116, 124 (1871) (charge requiring "the

spirit of oppressive malice or wantonness" approved); *Cameron* v. *Bryan*, 89 Iowa 214, 56 N.W. 434 (1893) (Rothrock, J.) ("willful and malicious" conduct necessary); *Wentworth* v. *Blackman*, 71 Iowa 255, 256-57, 32 N.W. 311, 311-12 (1887) (Rothrock, J.) (reversing award of punitive damages; "malicious act," which demands inquiry into defendant's "motives," required); *Inman* v. *Ball*, 65 Iowa 543, 546, 22 N.W. 666, 668 (1885) (Rothrock, J.) ("To warrant a jury in inflicting damages by way of punishment, it should appear that the act complained of was a willful or malicious wrong. *There must be a purpose or intent to harass, oppress, or injure another. This is a very different state of mind and purpose from that of a person who has no more than good reason to believe his act is wrongful*"); *Curl* v. *Chicago R.I. & P.R. Co.*, 63 Iowa 417, 428-29, 19 N.W. 308 (1884) (instruction permitting punitive damages if defendant "willfully used unnecessary force" held improper: "This instruction is erroneous in that it does not make the recovery of exemplary damages dependent upon malice [defined as "*a spirit of enmity, malevolence or ill will, with a desire to harm and a disposition to injure*"] of the wrong doer."); *Brown* v. *Allen*, 38 Iowa 306, 311 (1872) (only a "malicious [act] justif[ies] exemplary damages"); *Fuller* v. *Chicago & N.W.R. Co.*, 31 Iowa 187, 204 (1871); *Frink & Co.* v. *Coe*, 4 Greene 555, 559 (Iowa 1854) (special rule for common carriers); *Thomas* v. *Isett*, 1 Greene 470, 475 (Iowa 1848) ("wanton, rude, and aggravated manner, indicating malice or a desire to injure," needed for punitive damages); *The Atchison, Topeka & Santa Fe Railway Co.* v. *Ringle*, 71 Kan. 839, 840, 80 P. 43 (1905) ("in order to warrant the recovery of punitive, or exemplary, damages because of the negligence of the defendant such negligence must be so gross as to amount to wantonness, where no wilful or malicious acts are proved"); *Biggs* v. *D'Aquin Bros.*, 13 La. Ann. 21, 22 (1858) (no punitive damages awardable against party acting in "good faith"); *Stinson* v. *Buisson*, 17 La. 567, 572 (1841)

("redress in damages should . . . be proportioned to the injury sustained, unless it be where they are given as an example to deter others from similar conduct in future, and really for the purpose of punishing men for their bad motives and intentions"); *Wilkinson* v. *Drew*, 75 Me. 360, 363 (1883) (to recover punitive damages, jury must find "that the act or omission of the defendant was willful and wanton," with "wantonly" explicitly defined as "indicating wicked intent"); *Pike* v. *Dilling*, 48 Me. 539, 543 (1861) (court approved instruction that punitive damages could be awarded if defendant acted "wantonly," or " 'under the influence of actual malice, or with the intention to injure the plaintiff' "); *Friend* v. *Hamill*, 34 Md. 298, 314 (1871) ("malice, ill-will or corruption" necessary for punitive damages); *Zimmerman* v. *Helser*, 32 Md. 274, 278 (1869) (no punitive damages unless the defendant acts by "mere *pretense* for the purpose of perpetrating a wrong"); *Baltimore & Ohio R. Co.* v. *Blocher*, 27 Md. 277, 287 (1867); *Schindel* v. *Schindel*, 12 Md. 108, 122-23 (1858) ("The man who, from bad and malicious intentions, commits a trespass, ought, in justice, to be dealt with more harshly than one who acts from no vicious feelings, but ignorantly"); *Ellis* v. *Brockton Publishing Co.*, 198 Mass. 538, 542, 84 N.E. 1018, 1019 (1908) (punitive damages have not been and are not recoverable); *Carli* v. *Union Depot, Street R. & T. Co.*, 32 Mich. 101, 104, 20 N.W. 89, 90 (1884) (punitive damages "properly awarded only where the trespass appears to have been wanton, wilful, or malicious,—a conscious violation of the [plaintiff's] rights"); *Hyatt* v. *Adams*, 16 Mich. 180, 198-99 (1867) (refusal to charge that "if from the evidence no evil motive be imputed to the defendant, then the rule of compensation is fixed by law, and . . . exemplary damages are not allowable," reversed); *Lynd* v. *Picket*, 7 Minn. 184, 201 (1862) (explicitly approving instruction that if defendants, knowing plaintiff's property "to be exempt, wilfully and maliciously attached [it with] the purpose of harrassing and oppressing" him,

then punitive damages are awardable); *Whitfield* v. *Whitfield*, 40 Miss. 352, 366-67 (1866) (punitive damages require "malice, fraud, oppression, or wilful wrong"; no punitive damages if defendant "acts in good faith, and with no intent injuriously to affect plaintiff's rights"); *McKeon* v. *Citizens' R. Co.*, 42 Mo. 79, 87 (1867) (neither recklessness nor gross negligence supports punitive damages, which "can be given, if ever in a civil case, only in cases where the injury is intentionally, willfully, and maliciously done"); *Goetz* v. *Ambs*, 27 Mo. 28, 33 (1858) ("[I]ntention . . . only becomes material in considering the question of exemplary damages. If the injury is not intentional, but results simply from a want of proper care, nothing more should be recovered than will compensate for the actual damage. . . . [But if] wilfulness—a wrongful act, done intentionally . . ." exists, punitive damages are available); *Fay* v. *Parker*, 53 N.H. 342 (1872) (no prior decision adopts rule of punitive damages; doctrine rejected entirely); *Haines* v. *Schultz*, 50 N.J.L. 481, 484-85, 14 A. 488-89 (1888) (punitive damages res[t] primarily on a single ground—wrongful motive. . . . [I]t is the wrongful personal intention to injure that calls forth the penalty"); *King* v. *Patterson*, 49 N.J.L. 417, 419-20, 9 A. 705, 706 (1887) (while "malice" may not always mean actual ill will, when awarding punitive damages "malicious motive" was required); *Magee* v. *Holland*, 27 N.J.L. 86, 97 (1858) (punitive award upheld because action "was very different from a case of . . . mere negligence"); *Winter* v. *Peterson*, 24 N.J.L. 524, 529 (1854) (if official acted "not only . . . without authority, but maliciously, he was liable to exemplary damages"; "maliciously" means "from improper motives"); *Voltz* v. *Blackmar*, 64 N.Y. 440, 444 (1876) ("if the defendant . . . acted recklessly or willfully and maliciously, with a design to oppress and injure the plaintiff, the jury . . . may . . . award such additional damages as in their discretion they may deem proper"); *Taylor* v. *Church*, 8 N.Y. 452, 460 (1853) (jury may not award exemplary damages unless "satisfied that the defendant

was influenced by *actual* malice or a deliberate intention to injure the plaintiffs") (emphasis in original); *Louder* v. *Hinson*, 49 N.C. 369, 371 (1857) (charge requiring desire "to wreck their vengeance" on the plaintiffs and "harass and insult them" approved); *Causec* v. *Anders*, 20 N.C. 388, 389 (1839) (punitive damages proper where defendant was "actuated by malice and a total disregard of the laws"); *Simpson* v. *McCaffrey*, 13 Ohio 508, 522 (1884) (punitive damages available "for the wicked, corrupt, and malignant motive and design, which prompted [the guilty party] to the wrongful act"); *Rayner* v. *Kinney*, 14 Ohio St. 283, 287 (1863) (exemplary damages are "a punishment which should only attach to a wrongful intention. [W]here no wrongful intention is found, there is no just ground for the punishment of the defendant"); *Roberts* v. *Mason*, 10 Ohio St. 277, 279-80 (1859); *Pittsburgh, Cincinnati & Saint Louis Railway Co.* v. *Lyon*, 123 Pa. 140, 150, 16 A. 607 (1889) ("in those [torts] that are committed through mistake, ignorance, or mere negligence, the ordinary rule is mere compensation; but in such as are committed wilfully, maliciously, or so negligently as to indicate a wanton disregard of the rights of others, the jury are not restricted to compensation merely"); *McDevitt* v. *Vial*, 7 Sadler 585, 590, 11 A. 645, 648-49 (Pa. 1887) (charge requiring "a high handed spirit and a disposition to oppress and do wrong" approved); *Herdic* v. *Young*, 55 Pa. 176, 177 (1867); *Barnett* v. *Reed*, 51 Pa. 190, 191, 196 (1865) (instruction that absent "actual malice or design to injure, the rule is compensatory damages; but where actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages" termed "unexceptionable"); *M'Cabe* v. *Morehead*, 1 Watts & Serg. 513, 516 (Pa. 1841); *Herreshoff* v. *Tripp*, 15 R.I. 92, 94, 23 A. 104, 105 (1885) (punitive damages are available "only when the defendant has acted maliciously or in bad faith"); *Windham* v. *Rhame*, 11 S.C.L. 283, 285-87 (1858) (where evidence "show[s] a malicious motive . . . damages may be awarded not only to recom-

pense the plaintiff but to punish the defendant"; jury must "ascertain if the act be the result of accident or negligence, or of deliberate and evil purpose"); *Railway Co.* v. *Lee*, 90 Tenn. 570, 573, 18 S.W. 268 (1891) ("Exemplary damages are only allowed where a wrongful act is done with a bad motive, or so recklessly as to imply a disregard of social obligations, or where there is negligence so gross as to amount to positive misconduct"); *Brooke* v. *Clark*, 57 Tex. 105, 114 (1882) (exemplary damages allowed where conduct "was so grossly negligent as to raise the presumption of [defendants'] criminal indifference to results"); *Bradshaw* v. *Buchanan*, 50 Tex. 492, 494 (1878) (punitive damage award reversed because "there is no evidence tending to show that appellants were actuated by malice . . . or that they [acted] wantonly, or with the intent to vex, harass, injure, or oppress him."); *Neill* v. *Newton*, 24 Tex. 202, 204 (1859) (failure to allege "aggravated circumstances of misrepresentation and deception" bars punitive damages); *Cole* v. *Tucker*, 6 Tex. 266, 268 (1851) (punitive damages may be awarded if "fraud, malice, or wilful wrong" or "a desire to injure" exists); *Boutwell* v. *Marr*, 71 Vt. 1, 11, 42 A. 607, 610 (1899) ("wanton desire to injure"); *Lombard* v. *Batchelder*, 58 Vt. 558, 559-60, 5 A. 511, 512 (1886) ("malicious," "improper," and "evil" motive necessary); *Boardman* v. *Goldsmith*, 48 Vt. 403, 407 (1875) (instruction requiring that defendant "acted with express malice, intending to injure or disgrace the plaintiff" approved); *Hoadley* v. *Watson*, 45 Vt. 289, 292 (1873) (punitive damages available "on account of the bad spirit and wrong intention of the defendant"); *Earl* v. *Tupper*, 45 Vt. 275, 288 (1873) (after discussing rule in some States, court held that punitive damages are "to be governed wholly by the malice or wantonness of the defendant"); *Devine* v. *Rand*, 38 Vt. 621, 626 (1866) (Since punitive damages "depen[d] entirely upon the character and purpose of the defendant's acts, the usual evidence must be admissible to ascertain the disposition and intention which

prompted them"; punitive damages depend on "wickedness and wilfullness"); *Virginia Railway & Power Co.* v. *House*, 148 Va. 879, 885-86, 139 S.E. 480, 482 (1927) ("well settled" law requires reversing punitive damage award because there was no evidence of "any malicious or willful wrong"); *Parsons* v. *Harper*, 57 Va. 64, 78 (1860) (dictum) (if an "act were done without malice, the party might not be liable to exemplary and vindictive damages"); *Ogg* v. *Murdock*, 25 W. Va. 139, 146-47 (1884) (approves, as "proper rule," statement "when . . . there is no actual malice or design to injure, the rule is to allow compensatory damages; but when actual malice exists, a formed design to injure and oppress, the jury may give vindictive damages"); *Topolewski* v. *Plankinton Packing Co.*, 143 Wis. 52, 70, 126 N.W. 554, 560 (1910) ("the court has uniformly held that punitory damages are not allowable at all without the element of malice[;] the defendant [must have] acted with bad intent of some sort"); *Hamlin* v. *Spaulding*, 27 Wis. 360, 364 (1870) (defendant must act "in bad faith, and, if not with actual malice, at least for the purpose of serving some ulterior object outside of the administration of criminal justice"); *Hooker* v. *Newton*, 24 Wis. 292, 293 (1869) (approving charge requiring malice and intent to injure); *Morely* v. *Dunbar*, 24 Wis. 183, 186-87 (1869) (charge requiring "aggravation, insult, or cruelty, with vindictiveness or malice" approved; "malice" and "motive" are basis for punitive damages); *Barnes* v. *Martin*, 15 Wis. 240, 245 (1862) (punitive damages not awardable "unless the jury should find that the acts [of the defendant] were without apparent cause, and proceeded from wanton or malicious motives"); *McWilliams* v. *Bragg*, 3 Wis. 424, 431 (1854) ("where . . . injury is inflicted under circumstances of aggravation, insult or cruelty, with vindictiveness and malice" punitive damages available).

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No. 90-1572

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

ALABAMA POWER COMPANY,
Petitioner,

v.

GERALD L. TURNER, ADMINISTRATOR OF THE ESTATE OF KENNETH ALLEN TURNER, DECEASED,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the due process clause of the fourteenth amendment prohibit Alabama from adopting a unique system for civil wrongful death actions which prohibits compensatory damages and imposes damages measured solely by the conduct of the wrongdoer?

2. Should this Court, as a matter of federal constitutional law, legislate to a state the system it must use to assess damages in wrongful death actions?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Alabama Power's Conduct	2
B. The Jury Verdict	4
C. Review by the Alabama Courts	5
SUMMARY OF THE ARGUMENT	6
REASONS FOR DENYING THE WRIT	8
I. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION OF ANY OTHER STATE SUPREME COURT OR FEDERAL COURT OF APPEALS	8
A. All Courts Which Have Considered the Constitutionality of the Alabama Wrongful Death Statute Have Upheld It	8
B. The Cases Cited by Petitioner Consider Damages Fundamentally Different from Those Allowed by the Alabama Wrongful Death Statute	12
II. THE ISSUE PRESENTED IS NOT OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT PLENARY REVIEW	17
A. Alabama's Wrongful Death Statute Imposes Unique Damages and Subjects Any Verdict to a Unique System of Post Verdict Review	17
B. This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip* Provides Sufficient Direction to State Courts on the Issue of Punitive Damages	21

TABLE OF CONTENTS—Continued

Page

III. THE DECISION BELOW WAS FUNDAMENTALLY FAIR 23

IV. THIS COURT SHOULD NOT, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, LEGISLATE TO A STATE THE SYSTEM IT MUST USE TO ASSESS DAMAGES IN WRONGFUL DEATH ACTIONS 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES Page

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986), *after remand*, 505 So.2d 1050 (Ala. 1987) 20, 21
Alabama Electric Coop. v. Partridge, 215 So.2d 580 (Ala. 1968) 13
Alabama Power Co. v. Cantrell, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988) 12, 23, 24
Alabama Power Co. v. Capps, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988) .. 12, 23, 24
Alabama Power Co. v. Courtney, 539 So.2d 170 (Ala. 1989) 23
Alabama Power Co. v. Dunlay, 240 Ala. 568, 200 So. 617 (1941) 13
Alabama Power Co. v. Kirkpatrick, 268 Ala. 338, 105 So.2d 855 (1957) 24
Alabama Power Co. v. Marine Builders, Inc., 475 So.2d 54 (Ala. 1984) 23
Alabama Power Co. v. Robinson, 404 So.2d 22 (Ala. 1982) 23
Alabama Power Co. v. Scholz, 283 Ala. 259, 215 So.2d 447 (1968) 24
Alabama Power Company v. Sessions, 519 So.2d 1328 (Ala. 1988) 23
Alabama Power Co. v. Smith, 273 Ala. 509, 142 So.2d 228 (1962) 24
Alabama Power Company v. Stogner, 208 Ala. 666, 95 So. 151 (Ala. 1922) 23
Alabama Power Co. v. Talmadge, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922) 11, 24
Alabama Power Co. v. White, 377 So.2d 930 (Ala. 1979) 24
Bagley v. Grime, 28 Ala. 668, 220 So.2d 876 (1969) 15
Banker's Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 21
Beck v. Carolina Power & Light Co., 291 S.E.2d 897 (N.C.App.), *aff'd*, 297 S.E.2d 397 (1982) 27

TABLE OF AUTHORITIES—Continued

Page

Behrens v. Raleigh Hills Hospital Inc., 675 P.2d 1179 (Utah 1983) 27
Bell v. Riley Bus Lines, 257 Ala. 120, 57 So.2d 612 (1952) 16
Berenger v. Frink, 314 N.W.2d 388 (Iowa 1982) 27
Black Belt Wood Co. v. Sessions, 514 So.2d 1249 (Ala. 1986) 4, 15
Bonsignore v. City of New York, 521 F.Supp. 394 (S.D. N.Y. 1981) 18
Brown v. Maxey, 369 N.W.2d 677 (Wis. 1985) 18
Browning-Ferris Industries v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 21
Budd Wolf Chevrolet, Inc. v. Robertson, 508 N.E.2d 567 (Ind. App. 2 Dist. 1987) 18
Burford v. United States, 642 F.Supp. 635 (N.D. Ala. 1986) 16
Burlington Northern v. Whitt, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991) 11, 12, 22
Campbell v. Alabama Power Co., 378 So.2d 718 (Ala. 1979) 24
Campbell v. Davis, 274 Ala. 555, 150 So.2d 187 (1962) 15
Central Alabama Electric Coop. v. Tapley, 546 So.2d 371 (Ala. 1989) 6, 11, 13, 20
Church of Scientology of California v. Wollersheim, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 234 (1991) 22
Clardy v. Sanders, 551 So.2d 1057 (Ala. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 376, 107 L.Ed.2d 362 (1989) 11, 12, 14, 15
Clayton Brokerage v. Gordon, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991) 22
Curry v. Baker, 479 U.S. 1301 (Powell, Circuit Justice 1986) 21
Day v. Woodworth, 54 U.S. 363, 13 How. 363 (1852) 12
Denny v. Seaboard Lacquer, Inc., 487 F.2d 485 (4th Cir. 1973) 16, 17

TABLE OF AUTHORITIES—Continued

Page

Eichenseer v. Reserve Life Insurance Co., 894 F.2d 1414 (5th Cir. 1990), *cert. granted and remanded*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991) 18, 22
Eisert v. Greenberg Roofing & Sheet Metal Co., 314 N.W.2d 226 (Minn. 1982) 27
Employers Ins. Co. of Alabama v. Brock, 233 Ala. 551, 172 So. 671 (1937) 15-16
Esdale v. Baxter, 219 Ala. 256, 122 So. 12 (1929) .. 10
Esmond v. Youkers, 224 A.2d 793 (Pa. 1967) 16
Ex parte Harris, 277 Ala. 421, 171 So.2d 237 (1965) 24
Ex parte Newell, Inc., 569 So.2d 725 (Ala. 1990) .. 23
Ex parte Tanksley, 418 So.2d 94 (Ala. 1982) 23
First Interstate Development Corporation v. Ablanedo, 511 So.2d 536 (Fla. 1987) 18
Florida Railroad and Navigation Co. v. Webster, 25 Fla. 394, 5 So. 714 (1889) 13
Gavica v. Hanson, 608 P.2d 861 (Idaho 1980) 27
General American Life Insurance Company v. Simmons, 562 So.2d 140 (Ala. 1989), *cert. denied*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991) 22
Geohagan v. General Motors Corporation, 279 So.2d 436 (Ala. 1983) 14
Goetz v. Ambs, 27 Mo. 28 (1858) 13
Green Oil Co. v. Hornsby, 539 So.2d 218 (Ala. 1989) 5, 9, 20
Gross v. Delaware L. and W. R. Co., 50 NJL 317, 13 A. 233 (1888) 13
Hammond v. City of Gadsden, 493 So.2d 1374 (Ala. 1986) 5, 9, 21
Hospital Authority of Gwinnett, Georgia v. Jones, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991) 22
Howard v. Davis, 209 Ala. 113, 95 So. 354 (1923) .. 10
In re Paris Air Crash, 427 F.Supp. 701 (C.D. Cal. 1977) 27

TABLE OF AUTHORITIES—Continued

Page

In re Paris Air Crash, 622 F.2d 1315 (9th Cir. 1980) 27
Industrial Chemical and Fiberglass Corp. v. Chandler, 547 So.2d 812 (Ala. 1989) 1, 10, 11, 15
International Society of Krishna v. George, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991) 22
Jaffree v. Board of School Commissioners of Mobile County, 459 U.S. 13, 14 (1983) 8
Killough v. Jahandarfard, [Ms. 89-925 Feb. 15, 1991], —— So.2d —— (1991) 11
King v. Henkie, 80 Ala. 505 (1888) 13
Lewis v. Sears, Roebuck & Co., 512 So.2d 712 (Ala. 1987) 15
Loucks v. Standard Oil Co. of New York, 120 N.E. 198 (Ct. of App. N.Y. 1918) 14
Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) ..... *passim*
Louisville and N.R. Co. v. Bailey, 245 Ala. 178, 16 So.2d 167 (1943) 15
Macchiaroli v. Howell, 294 Mass. 144, 200 N.E. 905 (1936) 12
Marbury Lumber Co. v. Jones, 206 Ala. 669, 91 So. 623 (1921) 15
Massachusetts Mutual Life Insurance Company v. Collins, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991) 22
Mattison v. Kirk, 497 So.2d 120 (Ala. 1986) 23
Merrell v. Alabama Power Co., 382 So.2d 494 (Ala. 1980) 23-24
Mosley v. Alabama Power Co., 246 Ala. 416, 21 So.2d 305 (1945) 24
Murray v. Alabama Power Co., 413 So.2d 1109 (Ala. 1982) 23
Olympia Spa v. Johnson, 547 So.2d 80 (Ala. 1989) 11
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. ——, 111 S.Ct. 1032, 112 L.Ed.2d 1 (1991) ..... *passim*
Pacileo v. Walker, 446 U.S. 1307 (1980) 8

TABLE OF AUTHORITIES—Continued

	Page
Peevy v. Alabama Power Co., 393 So.2d 971 (Ala. 1981)	23
Pittsburg, Cincinnati and St. Louis Railway Co. v. Lyon, 123 Pa. 140, 16 A. 607 (1899)	13
Platomic Electric Power Co. v. Smith, 558 A.2d 768 (Md.App. 1989), *cert. denied*, 564 A.2d 407 (Md. 1989)	27-28
Portec, Inc. v. The Post Office, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991)	22
Putnam v. Savage, 244 Mass. 83, 138 N.E. 808 (1923)	12, 14
Ragsdale v. Altec Industries, 456 So.2d 54 (Ala. 1984)	23
Re Air Crash Disaster Near Chicago, 507 F.Supp. 21 (N.D. Ill. 1980), *aff'd*, 644 F.2d 633 (7th Cir. 1981)	27
Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955)	17
Richmond and Danville R.R. v. Freeman, 97 Ala. 289, 11 So. 800 (1892)	7, 11
Rivers v. Kairis, 442 N.E.2d 494 (Ohio 1982)	27
Root v. McDonald, 260 Mass. 344, 157 N.E. 684 (1927)	12
Rubeck v. Huffman, 374 N.E.2d 411 (Ohio 1978)	27
Savannah and Memphis R.R. v. Shearer, 58 Ala. 672 (1877)	9
Sliman v. Aluminum Co. of America, 731 P.2d 1267 (Idaho 1986)	18
Smith v. Wade, 461 U.S. 30 (1983)	14
Southern Ry. v. Bush, 122 Ala. 470 (Ala. 1898)	9, 11
State v. Sanchez, 579 P.2d 568 (Ariz. 1978)	16
Sullivan v. Alabama Power Co., 246 Ala. 262, 20 So.2d 224 (1945)	24
Thomas v. Eads, 400 N.E.2d 778 (Ind. App. 1980)	27
Traveler's Indemnity Co. v. Armstrong, 442 N.E.2d 349 (Ind. 1988)	18
Truelove v. Wilson, 285 S.E.2d 556 (Ga. App. 1981)	27

TABLE OF AUTHORITIES—Continued

	Page
Turner v. Alabama Power, 575 So.2d 551 (Ala. 1991)	6, 12
United States Cast Iron Pipe and Foundry Co. v. Sullivan, 3 F.2d 794, (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925)	6, 11, 17
United States v. Johnston, 268 U.S. 220 (1925)	24
Wardrobe v. California Stage Co., 7 Cal. 118, 120 (1857)	12
Watson v. Adams, 187 Ala. 490, 65 So. 528 (1914)	10
Worley v. Cincinnati H. and D. R. Co., 12 Ohio Dec Reprint 247, 1 *Handy* 481 (1853)	13
Yamaha v. Thornton, [Ms. 89-1618, May 3, 1991] —— So.2d —— (Ala. 1991)	11

STATUTES

Alabama Code § 2641 (1876)	8
Alabama Code Title 7 § 123 (1940)	8
Alabama Code § 6-5-410 (1975)	1, 8
Alabama Code § 6-11-20 (Supp. 1990)	15
Alabama Code § 6-11-29 (Supp. 1990)	15
Alabama Code § 27 (1896)	8
Alabama Code § 1940 (1852)	8
Alabama Code § 2589 (1887)	8
Alabama Code § 5696 (1923)	8
Fla. Stat. § 768.19 (1984)	26
Idaho Code § 5-311 (1982)	26
Ill. Rev. Stat. ch. 10 § 2 (1979)	27
Ind. Code § 34-1-1-2 (1975)	26
Iowa Code § 613.15 (1970)	26
Kan. Stat. Ann. § 60-1904	26
Mass. Gen. Laws Ann. Ch. 299, § 2 (West 1990)	18
Minn. Stat. § 573.02 (1982)	26
Mont. Code Ann. § 93-2810 (1990)	26

OTHER AUTHORITIES

Supreme Court Rule 10.1	8
Black's Law Dictionary 390 (6th ed. 1990)	13
Gamble, *Ala. Law of Damages*, § 37-9 (2d.ed. 1988)	18

TABLE OF AUTHORITIES—Continued

Page

Speiser, *Recovery for Wrongful Death* 2d. §§ 1:9, 3:3 (1975) 18, 26

Zabin, *The New Wrongful Death Act in Massachusetts Steps Into the Twentieth Century*, 58 Mass. L.Q. 345 (1973) 18

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Respondent.

Petition for Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, Alabama Power Company ("Alabama Power"), seeks review of a judgment imposed by the courts of Alabama under Alabama's wrongful death statute. *Alabama Code*, § 6-5-410 (1975). For more than 100 years Alabama has prohibited any compensatory damages for wrongful death and allowed the family of a person killed by the wrongful conduct of another to recover only damages based solely on the wrongdoer's conduct. Although these damages are labeled "punitive" the statute is remedial and not penal. *Louis Pizitiz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927); *Industrial and Chemical Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1989). The purpose of the statute is to "strike

at the evil of the *negligent* destruction of human life" and "to attempt to preserve human life by making homicide expensive." 274 U.S. at 116. (emphasis supplied).

The Alabama system is unique—both in the damages it allows and in its system of post-judgment review. The latter provides "meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 1045 (1991).

Alabama Power asserts a substantive due process challenge to the Alabama system because it allows the imposition of "punitive" damages for negligent conduct which causes death.[1] Alabama Power did not present its argument that due process requires "an express statutory or common law limit establishing in advance the maximum punishment that may be imposed" to the courts below. Pet. 4a-10a.

A. Alabama Power's Conduct

Alabama Power omits any description of its conduct for which the Alabama courts imposed this judgment other than to characterize it as "simple negligence." The evidence of misconduct—found by the jury, trial court and Supreme Court of Alabama to fully justify the amount of the damage award—shows something quite different.

Kenneth Turner, a long-haul truck driver, delivered a load of meat to the Hormel plant in Montgomery, Alabama. When he attempted to close the rear door of his trailer, the door struck a guy wire owned and maintained by Alabama Power.[2] Unknown to Kenneth Turner and

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[1] The Supreme Court of Alabama summarized Alabama Power's due process argument in its opinion. Petition for Writ of Certiorari (hereinafter "Pet.") at 4a.

[2] A guy wire is attached at the top of a utility pole and runs to an anchor on the ground to support the tension of power lines running in the opposite direction.

others who regularly parked along that street,[3] the upper portion of the guy wire was only 2½ inches from an energized conductor charged with 7200 volts of electricity. When the trailer door struck it, the guy wire made contact with the energized conductor and Kenneth Turner was electrocuted.

Alabama Power admitted that the clearance between that guy wire and the nearest energized conductor grossly violated all applicable safety standards.[4] Pet. at 28a. Alabama Power admitted these violations created an extremely dangerous condition likely to cause death or serious injury. Pet. at 28a.

Alabama Power has approximately 1,000,000 poles and more than 300,000 guy wires in its system. Between 3000 and 6000 guy wires are located at installations similar in configuration to the location where Kenneth Turner was killed.[5] Alabama Power admitted it has no system to identify such potentially dangerous locations, and no routine inspection program for its wires and equipment. Pet. at 29a.

The dangerous condition at this location resulted from a major construction project in the area some fifteen months before Kenneth Turner's death. Pet. at 28a. Alabama Power admitted that when the plans for construction were drawn the design engineer "eyeballed" the forces to be exerted on this particular pole and performed no calculations at all.[6] Pet. at 29a. The engineer's su-

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[3] This guy wire was located along a heavily traveled street. An apartment complex which housed many families was located only a few blocks away.

[4] The National Electric Safety Code required six inches clearance. Alabama Power's own standards required 12 inches clearance.

[5] At this location the guy wire ran between two energized conductors.

[6] Alabama Power also admitted that the design engineer should have calculated the forces exerted on the pole and that his calcula-

pervisor approved the design even though no computations had been done.

By the time the project was completed the design engineer had been transferred to another position and was performing the duties of both jobs. His inspection of the project was cursory at best. He measured no clearances. He either failed to notice the dangerous condition or, if he noticed it, took no action to correct it.

Alabama Power has no routine safety inspection program for its lines and equipment. However, employees walked directly past this location to read meters each month during the fifteen months prior to Kenneth Turner's death. In addition, Alabama Power employees made sixteen service calls within two blocks of this location. The dangerous condition was either not observed or if observed was not corrected. Pet. at 28a-29a.

B. The Jury Verdict

Alabama Power contended that Kenneth Turner was himself negligent in striking the guy wire with the door of his truck. Consequently the trial court instructed the jury as to both Plaintiff's negligence claim and his wantonness claim.[7]

The trial court provided a verdict form for the jury:

1. We, the jury, find for the Plaintiff based on (check one):

   negligence X

   wantonness ———

---

tions should have been reviewed by his superiors before the design was given final approval.

[7] In Alabama contributory negligence of the deceased is a complete defense to a wrongful death claim of negligence but not to a claim of wanton conduct. *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1258 (Ala. 1986).

The trial court submitted no special interrogatories to the jury. The jury was instructed that *either* of Plaintiff's theories would support a verdict under the Alabama wrongful death statute. Since the jury apparently rejected Alabama Power's contributory negligence defense, there was no reason for the jury to even consider the wantonness claim. The jury was required, however, to consider defendant's culpability in assessing the amount of damages. Alabama Power is simply incorrect in its assertion that the jury verdict "establishes that the basis of the jury's award was simple negligence and not wantonness." Pet. at 4. To the contrary, the jury verdict of $5,000,000 establishes that the jury found substantial culpability on the part of Alabama Power.

C. Review By The Alabama Courts

On Alabama Power's motion for new trial and request for remittitur, the trial court carefully reviewed the evidence which supported the jury verdict and applied the standards established in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).[8] The trial court held an evidentiary hearing and gave Alabama Power opportunity to offer evidence to suggest that the jury verdict was more severe than warranted by its misconduct or that the award would adversely affect its continued economic viability. Alabama Power offered no evidence whatsoever as to the financial impact the jury's award could or would have on it.

The trial court issued a detailed order that included specific findings: (1) that the jury award of $5,000,000 was not the result of any bias, passion or prejudice, (2)

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[8] Standards characterized by this Court as imposing "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 Sup.Ct. 1032, 1045, 113 L.Ed.2d 1, 14 (1991).

that the award was justified by the evidence presented, and (3) that the evidence indicated conduct by Alabama Power which justified imposition of damages in that amount. Pet. at 30a.

On appeal the Supreme Court of Alabama conducted a *de novo* review of the jury verdict and the trial court's post judgment order. The Supreme Court found no evidence of bias, passion, or prejudice and quoted with approval the trial court's post judgment order. Pet. 11a-15a. The Court also compared the award to awards in similar cases and, as a result, granted Alabama Power a new trial unless Turner accepted a $1,500,000 reduction in the jury verdict. Turner accepted the remittitur resulting in a judgment of $3,500,000.

SUMMARY OF THE ARGUMENT

Alabama Power asserts no basis for plenary review by this Court. The decision below is not inconsistent with any prior controlling opinion of this Court or in conflict with any decision of another state supreme court or federal court of appeals. This Court rejected substantially the same constitutional challenge made by Alabama Power more than sixty years ago. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). The United States Court of Appeals for the Fifth Circuit also rejected a similar constitutional challenge to the statute. *United States Cast Iron Pipe and Foundry Co. v. Sullivan*, 3 F.2d 794 (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925). The Alabama Supreme Court has rejected constitutional challenges, both soon after the statute was enacted and recently, including the decision below. *Richmond and Danville R.R. v. Freeman*, 97 Ala. 289 (1892); *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989); *Turner v. Alabama Power*, 575 So.2d 551 (Ala. 1991), Pet. 3a-10a.

None of the cases cited by Alabama Power requiring wanton, malicious or intentional conduct to justify puni-

tive damages are inconsistent with the decision below because in those cases punitive damages were awarded *in addition to* full compensation to the victim. The Alabama wrongful death statute prohibits any compensatory damages. The Alabama Supreme Court has recognized that the damages allowed by the statute are not "punitive" in the classic sense. Many characteristics of the statute confirm this interpretation. The courts of other states have consistently viewed damages recoverable under the Alabama wrongful death statute as different from classic punitive damages.

This Court should decline plenary review because the Alabama wrongful death statute is unique. It imposes unique damages and subjects any verdict to a unique system of post-judgment review. Consequently, this case presents no issue applicable outside the State of Alabama.

In a recent decision, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court considered at length the requirements of due process to assess punitive damages. Emphasizing the historic tradition of punitive damages, this Court recognized that the instructions to the jury and the Alabama system of post-judgment review impose a sufficiently definite and meaningful restraint on the discretion of Alabama fact finders in awarding punitive damages. There is no need for further review of this issue.

The decision below was fundamentally fair. Alabama Power had sufficient notice that its conduct could subject it to a substantial judgment. The Alabama procedures insured that the award was not grossly out of proportion to the severity of the offense. In fact, the court below reduced the jury award by $1,500,000.00.

Finally, this Court should not, as a matter of federal constitutional law, legislate to a state the system it must use to assess damages in wrongful death actions. Recovery for wrongful death is statutory in each of the fifty

states. The provisions of these statutes vary widely as to the measure and elements of recoverable damages. These statutory schemes represent a classic exercise of police power by the states. This Court should leave to the states the policy decision of what type damages to allow under such a statutory scheme.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT INCONSISTENT WITH ANY DECISION OF THIS COURT AND THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION OF ANY OTHER STATE SUPREME COURT OR FEDERAL COURT OF APPEALS.

Alabama Power's due process challenge to the Alabama wrongful death statute does not meet the requirements of Supreme Court Rule 10.1. The Supreme Court of Alabama's decision in this case is not inconsistent with any prior controlling opinion of this Court. There is no conflict between the decision below and any decision of another state supreme court or federal court of appeals. *See, Jaffree v. Board of School Commissioners of Mobile County*, 459 U.S. 13, 14 (1983); *Pacileo v. Walker*, 446 U.S. 1307 (1980).

A. All Courts Which Have Considered the Constitutionality of the Alabama Wrongful Death Statute Have Upheld It.

The Alabama wrongful death statute has a long history. The statute was first passed in 1852 and has been reenacted several times without substantial change.[9] The judicial interpretation that damages are to be assessed

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[9] *Alabama Code* § 1940 (1852); *Alabama Code* § 2641 (1876); *Alabama Code* § 2589 (1887); *Alabama Code* § 27 (1896); *Alabama Code* § 5696 (1923); *Alabama Code* Title 7, § 123 (1940); *Alabama Code* § 6-5-410 (1975).

based solely on the conduct of the defendant came more than 100 years ago.[10]

More than sixty years ago this Court unanimously rejected a constitutional challenge to the statute substantially the same as now asserted by Alabama Power. *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927). In *Yeldell* the family of a department store customer killed in an elevator brought a claim under the Alabama statute based only on negligence. In rejecting a due process challenge to the statute,[11] this Court stated:

> The legislation now challenged has been on the statute books of Alabama in essentially its present form since 1872. The liability imposed is for tortious acts resulting in death, but the damages, which may be punitive even though the act complained of involved no element of recklessness, malice or wilfulness, may be assessed against the employer who, as here, is personally without fault. The Supreme Court of Alabama has repeatedly ruled that the statute is aimed at the prevention of death by wrongful act or omission. "The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public wrongs."

274 U.S. at 114. (Citations omitted) (Quoting *Southern Ry. v. Bush*, 122 Ala. 470, 489 (1898).

Alabama Power relegates its discussion of this controlling precedent to a footnote. Pet. at 28. Alabama Power seeks to distinguish *Yeldell* as considering only the vicarious liability of the employer for the tortfeasor's negligence. This argument is curious at best. If these

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[10] *Savannah and Memphis R.R. v. Shearer*, 58 Ala. 672 (1877).

[11] It should be noted that the decision in *Yeldell* came years before Alabama established the unique substantive and procedural safeguards of *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989).

damages can constitutionally be levied against an admittedly innocent employer, *a fortiorari*, the damages can be assessed against the negligent employee. In addition, virtually identical arguments concerning "standardless discretion" of the jury to impose "an unlimited penalty" were made by the petitioner in that case.[12]

Moreover, this Court plainly stated:

> As interpreted by the state court, the aim of the present statute is to strike at the evil of the *negligent* destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in the common law rules, to attempt to preserve human life by making homicide expensive.

274 U.S. at 116. (emphasis supplied).

Contrary to Alabama Power's assertion [13] the Supreme Court of Alabama's interpretation of the wrongful death statute has not changed since *Yeldell*. The assumption on which this Court's decision was based—that Alabama's wrongful death statute was "remedial, and not penal"—is still valid. As recently as 1989 the Supreme Court of Alabama, citing this Court's decision in *Yeldell*, reaffirmed the remedial nature of the statute and its purpose —"the protection of human life." [14] *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812, 818 (Ala. 1989).

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[12] *Brief of Petitioner*, pp. 8-10, 29-30, 32, *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927).

[13] Pet. at 28.

[14] The Alabama Court has described the statute as remedial on numerous other occasions. *Esdale v. Baxter*, 219 Ala. 256, 122 So. 12 (1929); *Howard v. Davis*, 209 Ala. 113, 95 So. 354 (1923); *Watson v. Adams*, 187 Ala. 490, 65 So. 528 (1914).

This Court was not the first to uphold the constitutionality of the Alabama statute. In *Richmond and Danville R.R. v. Freeman*, 97 Ala. 289 (1892), the Supreme Court of Alabama upheld the statute against a constitutional challenge: "it is as clearly within legislative competency, of course, to punish *negligence* as it is to punish wantonness, willfulness or intentional wrongdoing." 97 Ala. at 295. (emphasis supplied). *See also, Southern Ry. v. Bush*, 122 Ala. 470, 489 (Ala. 1898); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 548, *cert. denied*, 259 U.S. 575 (1922).

In *United States Cast Iron Pipe and Foundry Company v. Sullivan*, 3 F.2d 794 (5th Cir. 1925), *cert. denied*, 268 U.S. 696 (1925), the United States Court of Appeals for the Fifth Circuit rejected the argument that the recovery of "punitive" damages for negligence alone violated the due process clause of the fourteenth amendment. "It is clearly within legislative competency to give a civil right of action for the *negligent* or wrongful killing of a human being, and to make the wrongdoer liable for punitive or exemplary damages." 3 F.2d at 796. (emphasis supplied).

The Supreme Court of Alabama has considered constitutional challenges to the wrongful death statute in a number of other cases. *Yamaha v. Thornton*, [Ms. 89-1618, May 3, 1991], —— So.2d —— (Ala. 1991); *Killough v. Jahandarfard*, [Ms. 89-925, Feb. 15, 1991], —— So.2d —— (Ala. 1991); *Burlington Northern v. Whitt*, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991); *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), *cert. denied*, 110 Sup.Ct. 376 (1989); *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989); *Olympia Spa v. Johnson*, 547 So.2d 80 (Ala. 1989); *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812 (Ala. 1988). On each occasion the Alabama Court has upheld the constitutionality of the statute. It rejected petitioner's challenges in

this case as well. *Turner v. Alabama Power*, 575 So.2d 551 (Ala. 1991), Pet. 3a-10a.

This Court has refused to reconsider its decision in *Yeldell* on at least four occasions. *Burlington Northern v. Whitt*, 575 So.2d 1011 (Ala. 1990), *cert. denied*, 59 U.S.L.W. 3672 (April 1, 1991); *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), *cert. denied*, 110 Sup.Ct. 376 (1989); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988). It should refuse again in this case.

Every court that has considered the Alabama wrongful death statute has upheld its constitutionality.[15] Alabama Power's petition for writ of certiorari should be denied.

B. The Cases Cited by Petitioner Consider Damages Fundamentally Different from Those Allowed by the Alabama Wrongful Death Statute.

Alabama Power bases its constitutional challenge on a flawed premise: that the damages recoverable for wrongful death in Alabama are equivalent to punitive damages recoverable under other forms of action. Each of the cases it cites involved punitive damages imposed *in addition to* full and adequate compensation of the victim for his injuries.[16] Alabama law is consistent in requiring

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[15] Alabama Power also fails to cite any case where a constitutional challenge to the Massachusetts statute was successful even though that statute assessed damages based solely on the conduct of the wrongdoer until a 1974 amendment. *See, Macchiaroli v. Howell*, 294 Mass. 144, 200 N.E. 905 (1936); *Root v. McDonald*, 260 Mass. 344, 157 N.E. 684 (1927); *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808 (1923).

[16] *Day v. Woodworth*, 54 U.S. 363, 13 How. 363 (1852) ("courts permit juries to *add to the measured compensation* of the plaintiff"); *Wardrobe v. California Stage Co.*, 7 Cal. 118, 120 (1857) (negligence did not give the jury power to "go beyond" compensation for "actual damages sustained" and award "punitive dam-

wanton or malicious conduct for the imposition of punitive damages *in addition to* full compensation.[17] This body of law is consistent with the traditional definition of punitive damages:

> Exemplary damages are damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him.

Compensatory damages on the other hand:

> Are such as will compensate the injured party for the injuries sustained, and nothing more.

Black's Law Dictionary 390 (6th ed. 1990).

The damages allowed by the Alabama wrongful death statute are different. The Alabama statute prohibits the family of the deceased from recovering any compensatory damages. Alabama refuses to allow any attempt to place a monetary value on human life. "One may be adequately compensated for his injuries but the value of human life is without measure."[18] *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371, 375 (Ala. 1989).

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ages"); *Florida Railway and Navigation Co. v. Webster*, 25 Fla. 394, 5 So. 714 (1889) ("only compensatory damages will be allowed, if there is no positive thought of the nature of recklessness"); *Goetz v. Ambs*, 27 Mo. 28 (1858) ("if the injury is not *intentional, but* results simply from a want of proper care, nothing more should be recovered *than will compensate* for the actual damage.") (emphasis supplied); *Pittsburg, Cincinnati and St. Louis Railway Co. v. Lyon*, 123 Pa. 140, 150, 16 A. 607 (1899) (torts committed through "mistake, ignorance, or mere negligence, the ordinary rule is *mere compensation*") (emphasis supplied). Every case which appears in Appendix G to the Petition involves such classic punitive damages.

[17] *Alabama Electric Coop. v. Partridge*, 215 So.2d 580 (Ala. 1968); *Alabama Power Co. v. Dunlay*, 240 Ala. 568, 200 So. 617 (1941).

[18] Many courts have cited this principle as the reason why no action for wrongful death existed at common law. *King v. Henkie*, 80 Ala. 505 (1888); *Gross v. Delaware L. and W. R. Co.*, 50 NJL 317, 13 A. 233 (1888); *Worley v. Cincinnati H. and D. R. Co.*, 12 Ohio Dec Reprint 247, 1 *Handy* 481 (1853).

In *Smith v. Wade*, 461 U.S. 30 (1983), then Justice Rehnquist criticized punitive damages in civil rights actions as "a windfall to plaintiffs, who are entitled to receive full compensation for their injuries—but no more." Alabama adheres to the principle that there can be no "full compensation" for the wrongful taking of a human life. Not even Alabama Power could suggest that Gerald Turner will receive a "windfall" as a result of the death of his son. Unlike the potential civil rights plaintiff Chief Justice Rehnquist considered, Mr. Turner will receive no compensation other than this verdict.

The Supreme Court of Alabama has often recognized that the damages recoverable under the wrongful death statute are not classic punitive damages: [19]

> The sense in which damages recoverable under the Alabama Homicide Act are deemed punitive is *sui generis* and the term is not used in the identical sense when applied to actions involving wanton misconduct or intentional injury.

Geohagan v. General Motors Corporation, 291 Ala. 167 (Ala. 1983) (Jones, J. dissenting).

In *Clardy v. Sanders*, 551 So.2d 1057 (Ala. 1989), the Supreme Court of Alabama denied a stay of the judgment to allow a petition for writ of certiorari to be filed in this Court. Two justices concurred specially to emphasize that:

> Punitive damages in a wrongful death case, such as the case, here, *are different in nature from punitive damages in any other type of tort action in Alabama.* The defendants constitutional arguments concerning this punitive damages award must be considered in a different light than constitutional challenges to puni-

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[19] This interpretation is consistent with decisions interpreting the Massachusetts statute which until 1973 also allowed damages based solely on the conduct of the defendant. *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198 (Ct. of App. N.Y. 1918) (Cardoza, J.); *Putnam v. Savage*, 244 Mass. 83, 138 N.E. 808 (1923).

> tive damages awards in other tort actions, because in Alabama, *only* punitive damages are recoverable in a wrongful death action.

551 So.2d at 1064. (emphasis supplied.); *See also, Black Belt Wood Co. v. Sessions*, 514 So.2d 1249, 1258 (Ala. 1986) (Maddox, J. concurring specially); *Industrial Chemical and Fiberglass Corp. v. Chandler*, 547 So.2d 812, 829 (Ala. 1988) (Maddox, J. concurring specially).

The Alabama Legislature has also recognized that the damages recoverable under the wrongful death statute are different from classic punitive damages. Recent legislation significantly restricted the availability of punitive damages. *Alabama Code* § 6-11-20 et seq. (Supp. 1990). However, the legislature specifically excluded actions under the Alabama wrongful death statute from the new law. *Alabama Code* § 6-11-29 (Supp. 1990). That distinction is consistent with the wrongful death statute and its attempt "to preserve human life by making homicide expensive." [20]

Many characteristics of the Alabama wrongful death statute confirm that the damages are not "punitive" in the classic sense. A wrongful death action does not abate with the death of the defendant although he can no longer be "punished." *Bagley v. Grime*, 28 Ala. 668, 220 So.2d 876 (1969); *Campbell v. Davis*, 274 Ala. 555, 150 So.2d 187 (1962). Contributory negligence is a defense to a wrongful death action but not to any other claim which would allow imposition of punitive damages. *Lewis v. Sears, Roebuck & Co.*, 512 So.2d 712 (Ala. 1987); *Louisville and N.R. Co. v. Bailey*, 245 Ala. 178, 16 So.2d 167 (1943); *Marbury Lumber Co. v. Jones*, 206 Ala. 669, 91 So. 623 (1921). The damages returned in a wrongful death action are covered by the standard liability insurance policy notwithstanding the typical exclusion from coverage for classic punitive damages. *Employers Ins. Co.*

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[20] *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 116 (1927).

of Alabama v. Brock, 233 Ala. 551, 172 So. 671 (1937). There is no apportionment of these damages among joint tortfeasors. *Bell v. Riley Bus Lines*, 257 Ala. 120, 57 So.2d 612 (1952).

The amount of any recovery is not includable in taxable income. *Burford v. United States*, 642 F. Supp. 635 (N.D. Ala. 1986). In *Burford*, the court emphasized that although Alabama law "labeled" wrongful death proceeds as "punitive" such damages were allowed for a compensatory rather than punitive purpose. 642 F. Supp. at 637.

The United States Court of Appeals for the Fourth Circuit considered the damages recoverable under the Alabama wrongful death statute in *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485 (4th Cir. 1973). The court rejected an attempt by the defendant to equate damages provided by the Alabama statute to exemplary damages in the traditional sense.[21] The court reasoned that:

> Damages under the statute are not punitive in the usual legal sense of that word because Alabama allows their recovery in death cases for less than wanton or malicious conduct, which is the ordinary standard for the imposition of punitive or exemplary damages. Although the use of the word punitive in Alabama jurisprudence, with respect to awards under the death statute, may be unfortunate, we observe that no state is without peculiarities in its law which, while familiar to the native bar, seemed strange to outsiders.

487 F.2d at 489. The court also based its decision on the availability of the defense of contributory negligence and the fact that such damages are awarded without any

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[21] *See also, Esmond v. Youkers*, 224 A.2d 793 (Pa. 1967) (damages awarded in Alabama wrongful death actions considered "punitive" even though their purpose is compensatory"; *State v. Sanchez*, 579 P.2d 568 (Ariz. 1978) (available damages regarded as "punitive" although survivors afforded recovery.)

compensatory damages to support a punitive award. 487 F.2d at 489.

Alabama Power cites no case where the Alabama wrongful death statute has been held unconstitutional. The only time this Court has considered "punitive" damages which were not imposed *in addition to* full compensation to the victim was in *Yeldell.* The Alabama Supreme Court's decision in this case is consistent with *Yeldell.* It is consistent with the Fifth Circuit decision in *Sullivan.*[22] It is also consistent with more than 100 years of Alabama legal tradition. The petition for writ of certiorari should be denied.

II. THE ISSUE PRESENTED IS NOT OF SUFFICIENT NATIONAL IMPORTANCE TO WARRANT PLENARY REVIEW.

A. Alabama's Wrongful Death Statute Imposes Unique Damages and Subjects Any Verdict to a Unique System of Post Verdict Review.

In order to justify plenary review by this Court a case must present "special and important reasons" deserving review. Supreme Court Rule 10.1(c).

> A federal question raised by a petitioner may be "of substance" in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants . . . . "special and important reasons" imply a reach to a problem beyond the academic or the episodic.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

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[22] *United States Cast Iron Pipe and Foundry Co. v. Sullivan,* 3 F.2d 794, *cert. denied,* 268 U.S. 696 (1925).

The Alabama wrongful death statute is unique.[23] Since a recent amendment to the Massachusetts statute,[24] Alabama stands alone in prohibiting compensatory damages and measuring the recovery for wrongful death solely by the culpability of the defendant. Gamble, *Alabama Law of Damages*, § 37-9 (2d ed. 1988); Speiser, *Recovery for Wrongful Death 2d*, § 3.3 (1975).

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[23] To bolster its weak argument that this case presents an issue justifying plenary review, Alabama Power asserts that other jurisdictions have authorized an award of punitive damages "for what appears to have been simple negligence." Pet. at 6-7. A review of those cases belies Alabama Power's position. In each case the court considered an award of *classic* punitive damages for malicious, wanton, or willful conduct. For example, in *Eichenseer v. Reserve Life Insurance Co.*, 894 F.2d 1414 (5th Cir. 1990), a classic punitive damage award resulted from "gross, callous or wanton conduct" as required under Mississippi law. 894 F.2d at 1417. The dissent, cited by Alabama Power, simply felt that the evidence in that particular case did not meet that legal requirement. Similarly, in *First Interstate Development Corporation v. Ablanedo*, 511 So.2d 536 (Fla. 1987), classic punitive damages were awarded because the defendant had made a deliberate and knowing misrepresentation. Each of the other cases cited by Alabama Power is similarly distinguishable. *Bonsignore v. City of New York*, 521 F.Supp. 394 (S.D. N.Y. 1981) (efforts to deal with police violence so inadequate as to constitute gross or wanton negligence); *Brown v. Maxey*, 369 N.W.2d 677 (Wis. 1985) (availability of punitive damages required proof of "malicious, outrageous or wanton disregard for rights"); *Traveler's Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind. 1988) (award of punitive damages vacated as unsupported by clear and convincing evidence); *Budd Wolf Chevrolet, Inc. v. Robertson*, 508 N.E.2d 567 (Ind. App. 2 Dist. 1987) (instructions given without objection became law of the case although an award of classic punitive damages required purposeful or willful conduct); *Sliman v. Aluminum Co. of America*, 731 P.2d 1267 (Idaho, 1986) (classic punitive damages required wanton, reckless or grossly negligent conduct but dissent disagreed that evidence supported such a finding).

[24] Mass. Gen. Laws Ann. Ch. 299, § 2 (West 1990); *see also*, Zabin, *The New Wrongful Death Act in Massachusetts Steps Into the Twentieth Century*, 58 Mass. L.Q. 345 (1973).

The Alabama wrongful death statute produces a unique type of damages. Although measured by the tortfeasor's culpability, the damages imposed are distributed to the heirs at law, are not included in taxable income, and are covered by liability insurance. Defenses not available to traditional punitive damage claims are available to the defendant in a wrongful death action. Evidence of the wealth of the defendant is excluded from the jury's consideration.

Alabama also imposes a unique system of post-judgment review to assure that the damages assessed in a wrongful death action do not unfairly "punish" the defendant. The defendant is afforded an evidentiary hearing to establish that the award is excessive and is guaranteed continuing economic viability except for the most egregious conduct.

The trial court is required to issue a written decision applying, among other, the following factors:

(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

(2) The degree of reprehensibility of the defendant's conduct would be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

(4) The financial position of the defendant would be relevant.

(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.

Green Oil Co. v. Hornsby, 539 So.2d 218, 223-224 (Ala. 1989).

This Court recently considered the Alabama system of post-judgment review and held that it "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages."[25] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 Sup.Ct. 1032, 1045 (1991). The trial court's application of these factors is subject to *de novo* review on appeal. *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala. 1989). The Supreme Court of Alabama is free to independently review the factual basis for the amount of the award. The Supreme Court also performs a "comparative analysis with other awards allowed in similar cases." *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987).

The Alabama wrongful death statute is unique. The damages assessed are unique. Alabama affords a unique system of procedural safeguards to assure that any

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[25] In spite of this Court's conclusion Alabama Power persists in characterizing the Alabama system as granting juries "broad discretion to assess punitive damages in virtually unlimited amounts." Pet. at 27. Clearly that is not the case.

verdict is fair, reasonable and based solely on the culpability of the wrongdoer. This Court should decline plenary review because the case presents no issue applicable anywhere outside the state of Alabama.[26]

B. This Court's Decision in *Pacific Mutual Life Ins. Co. v. Haslip* Provides Sufficient Direction to State Courts on the Issue of Punitive Damages.

Constitutional challenges to punitive damage awards have been presented to this Court on a number of occasions in the last few years.[27] In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), this Court fully considered the contention that punitive damage awards can, in some circumstances, violate the due process clause of the fourteenth amendment. The Court emphasized that punitive damages have long been a part of traditional state tort law and that no state or federal court has considered the common law method for assessing punitive damages to violate the due process clause. This Court recognized that the instructions to the jury[28] gave it significant—but by no means unlimited—discretion in assessing punitive damages. This Court also considered the post judgment review afforded by the *Hammond*[29] test. Since *Pacific Mutual* had received the benefits of "the full

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[26] *Cf. Curry v. Baker*, 479 U.S. 1301, 1302 (Powell, Circuit Justice 1986) (application for stay denied in case presenting "unique facts closely tied to Alabama election law and rules").

[27] *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Banker's Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986).

[28] The punitive damages instructions considered in *Haslip* were identical to the instructions given the jury in this case. The jury in this case was also instructed that the purpose of the Alabama wrongful death statute is to preserve human life.

[29] *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1983).

panoply of Alabama's procedural protections" [30] this Court rejected its due process challenge.

At the time of the decision in *Haslip*, nine petitions for writ of certiorari raising constitutional challenges to punitive damages awards were pending before this Court. This Court granted certiorari in seven of those cases and remanded them for consideration in light of the *Haslip* decision.[31] The two petitions which sought review of decisions of the Supreme Court of Alabama were denied.[32] This Court has since denied a petition for writ of certiorari challenging the constitutionality of the Alabama wrongful death statute on the identical grounds Alabama Power asserts here. *Burlington Northern v. Whitt*, 59 U.S.L.W. 3672 (April 1, 1991).

Through its decision in *Haslip*, this Court has provided clear instructions to the state courts as to the requirements of due process for assessing punitive damages. The *Haslip* decision will govern awards of classic punitive damage in any case other than one under the Alabama wrongful death statute. Alabama, the only state to impose wrongful death damages based solely on the culpability of the defendant, already provides the substantive and procedural protections endorsed by this

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[30] *Haslip*, 499 U.S. at 111 S.Ct. at 1046.

[31] *Reserve Life Insurance Company v. Eischenseer*, 894 F.2d 1414 (5th Cir. 1990), —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed. 233 (1991); *Clayton Brokerage v. Gordon*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 233 (1991); *Portec, Inc. v. The Post Office*, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991); *Hospital Authority of Gwinnett, Georgia v. Jones*, —— U.S. ——, 111 S.Ct. 1298, 113 L.Ed.2d 234 (1991); *Church of Scientology of Californic v. Wollersheim*, —— U.S. ——, 111 S.Ct. 1299 L.Ed.2d 234 (1991); *International Society of Krishna v. George*, —— U.S. ——, 111 S.Ct. 1299, 113 L.Ed.2d 235 (1991).

[32] *General American Life Insurance Company v. Simmons*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991); *Massachusetts Mutual Life Insurance Company v. Collins*, —— U.S. ——, 111 S.Ct. 1306, 113 L.Ed.2d 240 (1991).

Court in *Haslip*. There is no need for this Court to consider the issue further.

Alabama Power's petition does not present an issue of sufficient national importance to justify plenary review.

III. THE DECISION BELOW WAS FUNDAMENTALLY FAIR.

Fundamental fairness suggests that Alabama Power have notice that its conduct could subject it to a substantial judgment, that any award not be grossly out of proportion to the severity of the offense, and that there be sufficient procedural protections to insure its interest in rational decisionmaking is reasonably accommodated. These requirements were all met in the decision below.

There can be no dispute that Alabama Power had substantial notice that conduct of its employees which resulted in death could bring a substantial award under the Alabama wrongful death statute. Alabama Power was a party to the initial decision of the Supreme Court of Alabama which determined that "punitive" damages were the only type of damages recoverable in an action for the wrongful death of a child. *Alabama Power Company v. Stogner*, 208 Ala. 666, 95 So. 151 (Ala. 1922). Alabama Power has since been a defendant in actions brought under Alabama's wrongful death statute in at least twenty-two reported decisions.[33] Alabama Power

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[33] *Ex Parte Newell, Inc.*, 569 So.2d 725 (Ala. 1990); *Alabama Power Co. v. Courtney*, 539 So.2d 170 (Ala. 1989); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Sessions*, 519 So.2d 1328 (Ala. 1988); *Mattison v. Kirk*, 497 So.2d 120 (Ala. 1986); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988); *Alabama Power Co. v. Marine Builders, Inc.*, 475 So.2d 54 (Ala. 1984); *Ragsdale v. Altec Industries*, 456 So.2d 54 (Ala. 1984); *Ex parte Tanksley*, 418 So.2d 94 (Ala. 1982); *Murray v. Alabama Power Co.*, 413 So.2d 1109 (Ala. 1982); *Alabama Power Co. v. Robinson*, 404 So.2d 22 (Ala. 1982); *Peevy v. Alabama Power Co.*, 393 So.2d 971 (Ala. 1981); *Merrell v. Alabama*

has unsuccessfully sought a writ of certiorari in this Court in several of those cases.[34] There can be no question Alabama Power was aware of the potential consequences of its negligent conduct which resulted in death.

The jury award was fundamentally fair because it was based solely on Alabama Power's culpable conduct.[35] It simply does not matter whether its conduct is characterized as negligent, grossly negligent, wanton or willful. Due process merely requires that procedural and substantive safeguards be provided to insure that the amount of the judgment is not out of proportion to the gravity of that conduct. What could be more fundamentally fair than to base the amount of damages a defendant must pay on its own conduct? [36]

Alabama Power's conduct in this case was extremely culpable. This is not a case where the jury was dealing with a subtle question of what a reasonable man would

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Power Co., 382 So.2d 494 (Ala. 1980); *Campbell v. Alabama Power Co.*, 378 So.2d 718 (Ala. 1979); *Alabama Power Co. v. White*, 377 So.2d 930 (Ala. 1979); *Alabama Power Co. v. Scholz*, 283 Ala. 259, 215 So.2d 447 (1968); *Ex Parte Harris*, 277 Ala. 421, 171 So.2d 237 (1965); *Alabama Power Co.*, 273 Ala. 509, 142 So.2d 228 (1962); *Alabama Power Co. v. Kirkpatrick*, 268 Ala. 338, 105 So.2d 855 (1957); *Mosley v. Alabama Power Co.*, 246 Ala. 416, 21 So.2d 305 (1945); *Sullivan v. Alabama Power Co.*, 246 Ala. 262, 20 So.2d 224 (1945); *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922).

[34] *Alabama Power Co. v. Talmadge*, 207 Ala. 86, 93 So. 578, *writ of error dismissed*, 259 U.S. 575 (1922); *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), *appeal dismissed*, 486 U.S. 1002 (1988); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), *appeal dismissed*, 486 U.S. 1028 (1988).

[35] This Court should not grant plenary review to consider the particular facts on which this verdict was based. *United States v. Johnston*, 268 U.S. 220 (1925).

[36] Indeed, Alabama Power admits that due process requires only that any "punishment" be "commensurate with the degree of culpability." Pet. at 24.

do under the circumstances. Rather, Alabama Power admitted that the condition of its equipment grossly violated all applicable safety standards and created an extremely dangerous condition likely to cause death or serious injury. Pet. at 28a. The dangerous condition had existed at this location for fifteen months although Alabama Power employees had numerous opportunities to notice and correct the danger.

The wrongful death resulted from company policy as well as the failure of particular employees. Alabama Power has no system to identify potentially dangerous locations such as this one where guy wires run between energized conductors. Nor does Alabama Power have any routine inspection program for its wires and equipment. The trial court correctly found this conduct highly culpable. Pet. at 29a.

The unique safeguards adopted by Alabama to insure that the jury award was not out of proportion to the conduct of Alabama Power have been discussed at length earlier in this brief. This Court has endorsed those procedures and characterized them as imposing "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages." [37] Those procedural protections resulted in a reduction in the jury award against Alabama Power of $1,500,000.[38] Alabama Power, just as *Pacific Mutual*, has received the benefits of "the full panoply of Alabama's procedural protections." [39]

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[37] *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ——, ——, 111 Sup.Ct. 1032, 1045 (1991).

[38] The protections afforded by *Hammond* and *Green Oil* are much less needed in this case since Alabama Power was required to pay no compensatory damages and the damages assessed against it were not "in addition to" full and complete compensation to the victim.

[39] *Id.* 111 Sup.Ct. at 1046.

Alabama Power had notice that its conduct could lead to a substantial judgment, the award is not grossly out of proportion to the severity of the offense and Alabama Power was afforded "the full panoply of Alabama procedural protections." The petition for writ of certiorari should be denied.

IV. THIS COURT SHOULD NOT, AS A MATTER OF FEDERAL CONSTITUTIONAL LAW, LEGISLATE TO A STATE THE SYSTEM IT MUST USE TO ASSESS DAMAGES IN WRONGFUL DEATH ACTIONS.

Alabama Power asks this Court to engage in unprecedented judicial activism. It asks this Court, through judicial policy making, to dictate to Alabama the scheme it must use for recovery for wrongful death. That decision is a policy question the states should remain free to resolve.

Recovery for wrongful death is statutory in each of the fifty states. The provisions of these statutes vary widely as to the persons for whom such an action may be maintained, the measure and elements of recoverable damages and the distribution of any proceeds. Speiser, *Recovery for Wrongful Death 2d.* § 1:9 (1975). Some statutes provide a cause of action for a "wrongful act or omission," [40] others for "wrongful act, carelessness, negligence or default," [41] others for "wrongful or negligent injury or death," [42] and still others for "wrongful act or neglect".[43]

Some states measure the damages recoverable by the loss to the surviving beneficiaries including support and

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[40] *Ind. Code* § 34-1-1-2 (1975); *Minn. Stat.* § 573.02 (1982).

[41] *Fla. Stat.* § 768.19 (1984).

[42] *Iowa Code* § 613.15 (1970).

[43] *Mont. Code Ann.* § 93-2810 (1990); *Idaho Code* § 5-311 (1982); *Kan. Stat. Ann.* § 60-1904 (1989).

maintenance, loss of services and loss of companionship.[44] Some states allow recovery for mental anguish and grief of the survivors while others do not. Some states also allow the recovery of administration expenses and attorney's fees.[45]

Although Alabama is currently the only state which prohibits compensatory damages and allows only damages based solely on the conduct of the wrongdoer, until 1974 Massachusetts had a similar statute. Some statutes expressly provide for punitive damages,[46] some statutes are not specific as to punitive damages,[47] and other states have prohibited punitive damages.[48]

Several courts have considered constitutional challenges to wrongful death statutes which prohibit punitive damages. The United States District Court for the Central District of California struck down that state's law prohibiting punitive damages in wrongful death actions as violating the equal protection clause of the fourteenth amendment. *In Re Paris Air Crash*, 427 F.Supp. 701 (C.D. Cal. 1977). The United States Court of Appeals for the 9th circuit reversed in an opinion written by then Circuit Judge Anthony Kennedy. *In Re Paris Air Crash*, 622 F.2d 1315 (9th Cir. 1980). The court refused to apply a strict scrutiny standard and held that there was a rational relation between the statute and its legislative object.[49]

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[44] *Rivers v. Kairis*, 442 N.E.2d 494 (Ohio 1982).

[45] *Ill. Rev. Stat.* ch. 10 § 2 (1979); *Thomas v. Eads*, 400 N.E.2d 778 (Ind.App. 1980).

[46] *Beck v. Carolina Power & Light Co.*, 291 S.E.2d 897 (N.C. App.), *aff'd*, 297 S.E.2d 397 (1982).

[47] *Gavica v. Hanson*, 608 P.2d 861 (Idaho 1980); *Berenger v. Frink*, 314 N.W.2d 388 (Iowa 1982); *Behrens v. Raleigh Hills Hospital, Inc.*, 675 P.2d 1179 (Utah 1983).

[48] *Truelove v. Wilson*, 285 S.E.2d 556 (Ga.App. 1981); *Skell v. Grown*; *Rubeck v. Huffman*, 374 N.E.2d 411 (Ohio 1978); *Eisert v. Greenberg Roofing & Sheet Metal Co.*, 314 N.W.2d 226 (Minn. 1982).

[49] *See also, Re Air Crash Disaster Near Chicago*, 507 F.Supp. 21 (N.D. Ill. 1980), *aff'd*, 644 F.2d 633 (7th Cir. 1981). *Platomic Elec-*

As the court recognized *In Re Paris Air Crash*, it is well within the police power of a state to determine the damages available under its wrongful death statute. This Court has traditionally deferred to the states in the area of the exercise of their police powers:

> But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the states, sometime termed its "police power," to prescribe regulations to promote the health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the state; develop its resources and add to its wealth and prosperity.

Barbier v. Conolly, 113 U.S. 27, 29 (1885). This court should continue that tradition and decline to legislate for the states a system for recovery for wrongful deaths. The petition for writ of certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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No. 90-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ALABAMA POWER COMPANY,

Petitioner,

v.

GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

REPLY MEMORANDUM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY MEMORANDUM	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page
Alabama Power Co. v. *Cantrell*, 507 So. 2d 1295 (Ala. 1987), *appeal dismissed*, 486 U.S. 1028 (1988)	7
Alabama Power Co. v. *Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988)	7
Atlantic & Gulf Stevedores, Inc. v. *Elderman Lines, Ltd.*, 369 U.S. 355 (1962)	8
Bankers Life & Casualty Co. v. *Crenshaw*, 486 U.S. 71 (1988)	7
Black Belt Wood Co. v. *Sessions*, 514 So. 2d 1249 (Ala. 1987)	6
Bonsignore v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982)	2
Brown v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985)	2
Bud Wolf Chevrolet, Inc. v. *Robertson*, 508 N.E.2d 567 (Ind. Ct. App. 1987), *vacated in part*, 519 N.E.2d 135 (Ind. 1988)	2
Burlington Northern R. Co. v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250)	7
Clardy v. *Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (1989)	7
County of Riverside v. *McLaughlin*, No. 89-1817 (U.S. May 13, 1991)	8
Eichenseer v. *Reserve Life Insurance Co.*, 682 F. Supp. 1355 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303)	2
First Interstate Development Corp. v. *Ablanedo*, 511 So. 2d 536 (Fla. 1987)	2

Table of Authorities Continued

	Page
Intercontinental Life Insurance Co. v. *Lindblom*, *g.v.r.*, 59 U.S.L.W. 3693, 3701 (U.S. Apr. 15, 1991) (No. 90-1284)	3
Louis Pizitz Dry Goods Co. v. *Yeldell*, 274 U.S. 112 (1927)	6,7
Pacific Mutual Life Insurance Co. v. *Haslip*, No. 89-1279 (U.S. Mar. 4, 1991)	*passim*
Sliman v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267 (1986), *cert. denied*, 486 U.S. 1031 (1988)	2
Southern Life & Health Insurance Co. v. *Turner*, *g.v.r.*, 59 U.S.L.W. 3733, 3741 (U.S. Apr. 29, 1991) (No. 90-1399)	3
United States v. *Halper*, 490 U.S. 435 (1989)	5,6
Federal Constitutional Provision	
U.S. Const. amend. XIV	*passim*

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GERALD L. TURNER, Administrator of the Estate of KENNETH ALLEN TURNER, Deceased,

Respondent.

REPLY MEMORANDUM

In the Petition, Alabama Power Company ("Alabama Power") establishes that punitive damage awards for negligent, non-intentional, non-malicious conduct violate the Due Process Clause of the Fourteenth Amendment because (1) they are inconsistent with centuries of Anglo-American jurisprudence as validated by numerous opinions of this Court, and (2) they violate principles of fundamental fairness embodied in that Clause. Respondent's sole response on the merits is to assert that, "[i]t simply does not matter whether [Alabama Power's] conduct is characterized as negligent, grossly negligent, wanton or willful." Opp., at 24. Our legal heritage, however, demonstrates that such distinctions are constitutionally significant and that the departure of Alabama and other jurisdictions from these legal roots is con-

stitutionally unacceptable. Unless this Court disavows the historical analysis in *Pacific Mutual* before the ink on that opinion is dry, the historical analysis offered in the Petition must control the disposition of the first question presented by Alabama Power.[1]

Even if punitive damages for negligent, non-malicious conduct are constitutionally acceptable,[2] the

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[1] As demonstrated in the Petition, at 6-7 & n.5, Alabama is not the only jurisdiction that awards punitive damages for negligent, non-malicious conduct. Respondent contends that the cases cited by Alabama Power involved intentional, malicious conduct. Opp., at 18 n.23. This assertion is demonstrably erroneous. For example, in *Eichenseer* v. *Reserve Life Insurance Co.*, 682 F. Supp. 1355, 1373 (N.D. Miss. 1988), *aff'd*, 881 F.2d 1355 (5th Cir. 1989), *g.v.r.*, 59 U.S.L.W. 3625, 3628 (U.S. Mar. 18, 1991) (No. 89-1303), the district court expressly held that a "finding of malice on Reserve Life's part is not supported by the record." The district court in *Bonsignore* v. *City of New York*, 521 F. Supp. 394 (S.D.N.Y. 1981), *aff'd*, 683 F.2d 635 (2d Cir. 1982), stated that the jury found that the defendant had been negligent, but the court nonetheless affirmed the award of punitive damages. In *Brown* v. *Maxey*, 124 Wis. 2d 426, 369 N.W.2d 677 (1985), the district court noted that the jury verdict forms asked only whether the defendant had been negligent and proceeded to affirm the punitive damage award. *See also First Interstate Development Corp.* v. *Ablanedo*, 511 So. 2d 536 (Fla. 1987) (Overton, J., dissenting) (defendant's tort lacked "additional circumstance of aggravation" to justify punitive damages); *Sliman* v. *Aluminum Co. of America*, 112 Idaho 277, 731 P.2d 1267 (1986) (McFadden, J., dissenting) (criticizing majority for awarding punitive damages for mere negligence), *cert. denied*, 486 U.S. 1031 (1988); *Bud Wolf Chevrolet, Inc.* v. *Robertson*, 508 N.E.2d 567 (Ind. Ct. App. 1987) (Buchanan, J., concurring in part and dissenting in part) (the majority position allows punitive damage awards for mere negligence), *vacated in part*, 519 N.E.2d 135 (Ind. 1988) (upheld punitive damage award).

[2] To support his argument that Alabama's punitive damage

Petition presents the further question of what procedural limitations, in addition to those that, under *Pacific Mutual*, apply to cases in which punitive damages are imposed for intentional, malicious conduct, should be adopted to restrict the discretion of juries and courts to impose punitive damages for simple negligence. Respondent's cursory answer to this question is that no procedural requirements are necessary to restrain juries and courts because "Alabama refuses to allow any attempt to place a monetary value on human life." Opp., at 13.[3] This state policy, how-

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system is constitutional even as applied to negligent, non-malicious conduct, respondent notes that subsequently to the decision in *Pacific Mutual*, this Court denied certiorari in three Alabama cases challenging the constitutionality of punitive damage awards in Alabama. Opp., at 22. None of those cases, however, involved the imposition of punitive damages for negligent, non-malicious conduct. Furthermore, respondent conveniently overlooks the fact that this Court subsequently granted certiorari in two other Alabama punitive damage cases, which it vacated and remanded for reconsideration in light of *Pacific Mutual*. *See Southern Life & Health Insurance Co.* v. *Turner*, *g.v.r.*, 59 U.S.L.W. 3733, 3741 (U.S. Apr. 29, 1991) (No. 90-1399); *Intercontinental Life Insurance Co.* v. *Lindblom*, *g.v.r.*, 59 U.S.L.W. 3693, 3701 (U.S. Apr. 15, 1991) (No. 90-1284).

[3] This assertion is, of course, literally untrue. As Alabama Power points out in the Petition, at 27 & n.28, Alabama (similar to other neighboring jurisdictions) has established a monetary criminal punishment of $2,000 for negligent homicide. What Alabama has refused to do is to establish an analogous limit on monetary punishment that can be imposed by *civil* juries and courts for the negligent loss of life. Alabama Power's position is that Alabama is constitutionally compelled to do on the civil side what it (and every other State) has done on the criminal side. As Alabama Power points out, Pet. at 29, if Alabama desires to establish a system of higher fines for corporations which negligently cause the loss of a life that recognizes that corporations cannot be sentenced to prison, Alabama may do so.

ever, only dramatizes the unconstitutionality of the imposition of punitive damages for negligent, non-malicious conduct: although respondent seems to concede that punishment must be proportional to the wrongdoing at issue, Alabama's controls over punitive damage awards for mere negligence are in fact less stringent than those applied to cases involving intentional conduct. Thus, in Alabama and other jurisdictions which allow punitive damages for negligent conduct, punitive awards for negligence will, as in this case, very likely exceed by millions of dollars punitive awards for intentional, malicious conduct.

Respondent's attempt to evade the questions presented in the Petition through conclusory, glib assertions must fail; so must its efforts to recharacterize the undeniably punitive quality of the $3,500,000 award at issue and to displace the jury's determination, confirmed expressly by the Supreme Court of Alabama, that this case involves only negligent, non-malicious conduct. Respondent fabricates, out of whole cloth, the concept of "classic punitive damages" in an attempt to convince this Court that the damages awarded in this case constitute something other than what they obviously are: punitive damages. And in an effort to avoid the jury's unequivocal conclusion that Alabama Power's conduct was merely negligent, and not wanton, respondent further asserts that the jury verdict form means the exact opposite of what it states: thus, according to respondent, the check mark after the word "negligence" and the absence of any mark after the word "wantonness" indicates not that Alabama Power was only negligent, but that it was wanton. Alabama Power will address both of these untenable contentions in turn.

1. Respondent attempts, unsuccessfully, to distinguish this case from myriad cases decided over several centuries in which punitive damage awards for mere negligence were soundly repudiated by advancing the meaningless distinction that in those cases, unlike this case, compensatory damages were awarded in addition to punitive damages. Repeatedly characterizing the punitive awards in those cases as "classic punitive damages," *e.g.*, Opp., at 14-15, respondent relies on a hitherto unheard of classification that cannot be reconciled with this Court's precedent. *For constitutional purposes*, this Court has recognized only two types of civil damages, compensatory and punitive. *See United States* v. *Halper*, 490 U.S. 435, 447-48 (1989). Under *Halper*, any damages that are not compensatory are, by definition, punitive for purposes of analysis under the Constitution; there is no middle ground and there are no degrees of punitive damages. Respondent's assertion that damages awarded under Alabama's punitive damage system are somehow different from other punitive damages, therefore, is pure *ipse dixit*.

As respondent admits, the damages awarded in this case are not compensatory. Opp., at 13. The record in this case is devoid of any evidence to support a claim for compensatory damages; indeed, the Alabama courts have chosen to construe Alabama's wrongful death act in such a way as to preclude the admissibility of such evidence by making it legally irrelevant to the cause of action for wrongful death. Furthermore, the punitive damage instructions given to the jury in this case were identical to the instructions employed in *Pacific Mutual* which, as the respondent necessarily concedes, involved punitive, not compen-

satory, damages. Opp., at 21 n.28. Reflecting this state of affairs, the jury verdict form characterizes the award as "punitive damages." Pet., at 32a.

Respondent further attempts to distinguish the punitive award in this case from "classic punitive damages" by contending that punitive damage awards under Alabama's wrongful death statute are remedial, not penal, in nature. Opp., at 10. The Supreme Court of Alabama, however, has unequivocally held that damages awarded under that statute are penal in nature. *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249, 1262 (Ala. 1987). Even if Alabama courts may have been somewhat inconsistent in the *label* that has been applied to these damages, it is beyond peradventure that the *substance* of these damages is punitive, not compensatory, and that the characterization of the damages as a matter of state law is in any event irrelevant to the constitutional point. *See Halper*, 490 U.S., at 447-48.[4]

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[4] Respondent further attempts to distinguish the punitive award in this case by arguing that this Court, in *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U.S. 112 (1927), upheld as constitutional punitive damage awards for mere negligence under Alabama's wrongful death statute. *See* Opp., at 9-10. Respondent argues that because this Court held in *Pizitz* that an employer could be liable for punitive damages on account of his employee's negligence, such liability could also be constitutionally applied to the employee. Opp., at 10. This argument, however, finds no support in the Court's decision in *Pizitz*. As discussed in the Petition, at 28 n.20, this Court in *Pizitz* assumed, without addressing the issue, that the employee himself could have been liable for punitive damages for his negligent conduct; accordingly, the Court limited its analysis to the constitutionality of imposing such liability on a *respondeat superior* basis. This case, therefore, tests the Court's uncritical, unlitigated and therefore

2. Respondent also contends that the jury found that Alabama Power had been more than merely negligent. Opp., at 5. The absurdity of this contention is obvious: the verdict form unequivocally indicates that the jury found that Alabama Power had acted negligently and not wantonly, a conclusion which the Supreme Court of Alabama expressly adopted, *see* Pet., at 1a. Respondent speculates that the only reason the jury did not find Alabama Power liable for wanton conduct was that the jury could have rejected

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undecided assumption that a negligent tortfeasor may be liable for punitive damages notwithstanding centuries of Anglo-American jurisprudence to the contrary.

Respondent erroneously contends that this Court declined to reconsider its decision in *Pizitz* on four occasions. Opp., at 12. In one of those cases, however, the Court dismissed the appeal for lack of jurisdiction, a reason entirely unrelated to the decision in *Pizitz*. *See Alabama Power Co.* v. *Capps*, 519 So. 2d 1328 (Ala.), *appeal dismissed*, 486 U.S. 1002 (1988) (federal question not properly presented). In another case, *Alabama Power Co.* v. *Cantrell*, 507 So. 2d 1295 (Ala. 1987), *appeal dismissed*, 486 U.S. 1028 (1988), the only question presented by the appellant was the constitutionality of Alabama's appeal penalty statute, the constitutionality of which was upheld in *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988), thus resulting in the dismissal of Alabama Power's appeal for want of a substantial federal question. *Clardy* v. *Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (1989), involved wanton misconduct, so the Court's punitive damage holding in *Pizitz* was not implicated. In *Burlington Northern R. Co.* v. *Whitt*, No. CV-85-311 (Ala. Dec. 21, 1988), *cert. denied*, 59 U.S.L.W. 3665, 3672 (U.S. Apr. 1, 1991) (No. 90-1250), a case Alabama Power has previously addressed, *see* Pet., at 4-5, the jury was not asked to determine whether the defendant had acted wantonly or merely negligently and the Supreme Court of Alabama expressly found that the record contained substantial evidence of wantonness.

Alabama Power's contributory negligence claim. Opp., at 5.[5] The jury verdict form speaks for itself—only negligence, not wantonness, was checked; so also does the Supreme Court of Alabama's conclusion that the "jury found Alabama Power guilty of negligence," Pet., at 1a. This unambiguous record provides no basis for probing the jury's mind or otherwise avoiding the sharply presented questions Alabama Power brings to this Court for review. A system of civil "justice" that permits the imposition of virtually unlimited punishment based upon the unfettered discretion of juries and judges is, quite literally, "the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as our own." *County of Riverside* v. *McLaughlin*, No. 89-1817 (U.S. May 13, 1991) (Scalia, J., dissenting), slip op., at 13.

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[5] Respondent also attempts to reargue the facts of this case, alleging that Alabama Power's conduct constituted more than mere negligence and, in effect, asking this Court to set aside the critical findings of fact by the Supreme Court of Alabama in its opinion in this case. Opp., at 2-4. This Court, however, has no authority to redetermine facts found by the jury and confirmed by the highest court of a state. *See Atlantic & Gulf Stevedores, Inc.* v. *Elderman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962) (Supreme Court cannot "redetermine facts found by the jury").

CONCLUSION

Certiorari should be granted and the important questions presented should be set for plenary consideration.

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Respectfully submitted,

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